DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1447
Title: Coy A. Koontz, Jr., Petitioner
v.
St. Johns River Water Management District
Docketed: June 1, 2012
Linked with 11A909
Lower Ct: Supreme Court of Florida
Case Nos.: (SC09-713)
Decision Date: November 3, 2011
Rehearing Denied: January 4, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 20 2012	Application (11A909) to extend the time to file a petition for a writ of certiorari from April 3, 2012 to June 1, 2012, submitted to Justice Thomas.
Mar 30 2012	Application (11A909) granted by Justice Thomas extending the time to file until June 1, 2012.
May 30 2012	Petition for a writ of certiorari filed. (Response due July 2, 2012)
Jun 22 2012	Order extending time to file response to petition to and including August 1, 2012.
Aug 1 2012	Brief of respondent St. Johns River Water Management District in opposition filed.
Aug 14 2012	Reply of petitioner Coy A. Koontz, Jr. filed. (Distributed)
Aug 15 2012	DISTRIBUTED for Conference of September 24, 2012.
Oct 1 2012	DISTRIBUTED for Conference of October 5, 2012.
Oct 5 2012	Petition GRANTED.
Oct 31 2012	SET FOR ARGUMENT ON Tuesday, January 15, 2013.
Nov 6 2012	Conditional consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 8 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including November 21, 2012.
Nov 8 2012	The time to file respondent's brief on the merits is extended to and including December 21, 2012.
Nov 13 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Nov 21 2012	Joint appendix filed. (Statement of costs filed)
Nov 21 2012	Joint appendix (exhibits volume) filed.
Nov 21 2012	Brief of petitioner Coy A. Koontz, Jr. filed.
Nov 27 2012	Brief amici curiae of Association of Florida Community Developers, et al. filed.

Nov 28 2012	Brief amicus curiae of National Federation of Independent Business Small Business Legal Center filed.
Nov 28 2012	Brief amicus curiae of Hillcrest Property, LLP filed.
Nov 28 2012	Brief amicus curiae of American Civil Rights Union filed.
Nov 28 2012	Brief amicus curiae of Land Use Institute, Ltd. filed.
Nov 28 2012	Brief amici curiae of National Association of Home Builders, et al. filed.
Nov 28 2012	Brief amici curiae of Atlantic Legal Foundation, et al. filed.
Nov 28 2012	Brief amici curiae of Institute for Justice, et al. filed.
Nov 28 2012	Brief amicus curiae of Owners' Counsel of America filed.
Dec 6 2012	CIRCULATED
Dec 21 2012	Brief of respondent St. Johns River Water Management District filed. (Distributed)
Dec 27 2012	Brief amici curiae of Former Members of the National Research Council Committee on Mitigating Wetland Losses filed. (Distributed)
Dec 28 2012	Brief amici curiae of National Governors Association, et al. filed. (Distributed)
Dec 28 2012	Brief amicus curiae of the United States filed. (Distributed)
Dec 28 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 28 2012	Brief amici curiae of American Planning Association, et al. filed. (Distributed)
Dec 28 2012	Brief amici curiae of California, et al. filed. (Distributed)
Dec 28 2012	Record received from the Supreme Court of Florida. (1 box)
Jan 4 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 8 2013	Reply of petitioner Coy A. Koontz, Jr. filed. (Distributed)
Jan 15 2013	Argued. For petitioner: Paul J. Beard, II, Sacramento, Cal. For respondent: Paul R. Q. Wolfson, Washington, D. C.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

No. _____

In the

Supreme Court of the United States

COY A KOONTZ, JR.,
Petitioner,

v.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For over eleven years, a Florida land use agency refused to issue any of the permits necessary for Coy A. Koontz, Sr., to develop his commercial property. The reason was because Koontz would not accede to a permit condition requiring him to dedicate his money and labor to make improvements to 50 acres of government-owned property located miles away from the project—a condition that was determined to be wholly unrelated to any impacts caused by Koontz's proposed development. A Florida trial court ruled that the agency's refusal to issue the permits was invalid and effected a temporary taking of Koontz's property, and awarded just compensation. After the appellate court affirmed, the Florida Supreme Court reversed, holding that, as a matter of federal takings law, a landowner can never state a claim for a taking where (1) permit approval is withheld based on a landowner's objection to an excessive exaction, and (2) the exaction demands dedication of personal property to the public.

The questions presented are:

1. Whether the government can be held liable for a taking when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and

2. Whether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services,

labor, or any other type of personal property to a public use.

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PETITION FOR WRIT OF CERTIORARI

As personal representative of the Estate of Coy A. Koontz, Sr.,[1] Coy A. Koontz, Jr. (hereinafter, "Koontz"), respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at *St. Johns River Water Management District v. Koontz*, 77 So. 3d 1220 (Fla. 2011), and is reproduced in Petitioner's Appendix (Pet. App.) at A. The Florida Supreme Court's decision denying rehearing and/or clarification is reported at __ So. 3d __, 2012 Fla. LEXIS 1 (Fla. 2011). The opinion of the District Court of Appeal of the State of Florida, 5 So. 3d 8 (Fla. Ct. App. 2009), is reproduced in Pet. App. at B. The opinion of the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, is not published, but is reproduced in Pet. App. at D.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). Koontz filed an inverse condemnation lawsuit in the Florida state courts challenging the District's permit decisions as violating the Fifth and Fourteenth Amendments of the United States

[1] Coy Koontz, Sr., owned the subject property and filed the present lawsuit. When Koontz, Sr., passed away in the midst of litigation, his estate—as represented by his son, Koontz, Jr.—became the successor to the property and to his interest in the litigation.

Constitution, among other laws. Koontz prevailed in the Florida trial and appellate courts, but the Florida Supreme Court reversed in an opinion dated November 3, 2011. The Florida Supreme Court's decision became final on January 4, 2012, when the court denied Koontz's motion for reconsideration and/or clarification. On March 30, 2012, Justice Thomas granted Petitioner's application to extend the time within which to file the petition to June 1, 2012. *Koontz v. St. Johns River Water Management District*, No. 11A909.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. St. Johns River Water Management District Denies Koontz's Land-Use Permits, After He Refuses to Perform Costly Off-Site Work on the District's Property As the "Price" of Permit Approval

Koontz owned 14.2 acres of vacant land in Orange County, Florida. Pet. App. A-5. Zoned for commercial use, the property is immediately south of State Road 50 and immediately east of State Road 408—two major roadways. *Id.* Koontz sought to improve 3.7 acres of the property, which surrounding residential and commercial development, road construction, and other government projects had seriously degraded. Pet. App. D-3. Although the site had become unfit for animal habitat, most of it lay officially within a habitat protection zone subject to the St. Johns River Water Management District's jurisdiction. *Id.* Of the site's 3.7 acres, 3.4 were deemed to be wetlands, and 0.3 were uplands.[2] Pet. App. A-5.

In 1994, Koontz applied to the District for permits to dredge and fill 3.25 acres of wetlands. Pet. App. A-4 – A-6. As mitigation for the proposed project's disturbance of wetlands, Koontz agreed to dedicate the remainder of his property—almost 11 acres—to the State for conservation. Pet. App. A-6. But the District was not satisfied with nearly 80% of Koontz's land and leveraged its permitting power to press Koontz for

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[2] After the inverse condemnation trial, the District determined that the development would only disturb approximately 0.8 acres of degraded wetlands. St. Johns River Water Management District's Opening Brief on the Merits at 5-8 (Fla. Sup. Ct., Nov. 12, 2009).

more: It demanded that Koontz enhance 50 off-site acres of wetlands on the District's property located between 4-1/2 and 7 miles away, by replacing culverts and plugging some ditches. Pet. App. A-6, D-4. The cost of the off-site work was estimated to be in the range of $10,000 (the District's estimate) to between $90,000 and $150,000 (Koontz's expert's estimate). Pet. App. D-4. The District never demonstrated how the off-site improvement of 50 acres of wetlands on government lands was related in nature or extent to the alleged impact of the Koontz's dredge-and-fill activities on little more than three acres of degraded wetlands. Pet. App. D-11.

Koontz refused the District's demand. Because of his refusal to comply, the District denied outright his permit applications. Pet. App. A-6. The District would not issue permits unless and until Koontz submitted to its off-site-work condition. *Id.*

B. Koontz Sues for Inverse Condemnation Under *Nollan* and *Dolan*, and Prevails in the Trial and Appellate Courts

Koontz brought an inverse-condemnation suit against the District in the Florida trial court. He alleged that the District's off-site improvements condition was unconstitutional under the Fifth and Fourteenth Amendments, as interpreted in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Pet. App. D-4. *Nollan* and *Dolan* provide the framework for assessing the constitutionality of extortionate conditions imposed by land-use agencies in the permitting process.

In *Nollan*, a state land-use agency, the California Coastal Commission, required the Nollans, owners of beach-front property, to dedicate an easement over a strip of their private beach as a condition of obtaining a permit to rebuild their home. *Nollan*, 483 U.S. at 827-28. The condition specifically was justified on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a 'wall' of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,'" and would "increase private use of the shorefront." *Id.* at 828-29 (quoting Commission). The Nollans refused to accept the condition and brought a federal taking claim against the Commission in state court to invalidate the condition. *Id.* at 828. The Nollans argued that the condition was unlawful, because it bore no connection to the impact of their proposed remodel.

This Court agreed, holding that the Commission's easement condition lacked an "essential nexus" to the alleged social evil that the Nollans' project caused. *Id.* at 837. The Court found that because the Nollans' home would have no impact on public beach access, the Commission could not justify a permit condition requiring them to dedicate an easement over their property. *Id.* at 838-39. Without a constitutionally sufficient connection between a permit condition and a project's alleged impact, the easement condition was "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 837 (citations omitted).

Similarly, in *Dolan*, 512 U.S. 374, this Court defined how close a "fit" is required between a permit condition and the alleged impact of a proposed land

use. There, the city imposed conditions on Dolan's permit to expand her store that required her to dedicate some of her land for flood-control and traffic improvements. *Id.* at 377. Dolan refused the conditions and sued the city, alleging that they effected an unlawful taking and should be enjoined.

This Court held that the city had established a connection between both conditions and the impact of Dolan's proposed expansion under *Nollan*, but nevertheless held that the conditions were unconstitutional. *Id.* at 394-95. Even when an "essential nexus" exists, the Court explained, there still must be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—i.e., "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. This Court held that the city had not demonstrated that the conditions were roughly proportional to the impact of Dolan's expansion and struck them down. *Id.* at 394-95.

Applying *Nollan* and *Dolan*, the trial court found that the District "did not prove the necessary relationship between the condition of off-site mitigation and the effect of development." Pet. App. D at 11. The court explained that the District failed to show either an "[essential] nexus between the required off-site mitigation and the requested development of the tract[]" as required in *Nollan*, or "rough proportionality to the impact of site development," as required in *Dolan*. *Id.* Accordingly, the trial court concluded that the District's "denial of the Koontz

permit application . . . was invalid" and "resulted in a regulatory taking." *Id.*

On remand from the trial court, the District concluded that the proposed development would have substantially less impacts on wildlife habitat than it had previously thought and issued the permits to Koontz. Pet. App. A-7. The trial court subsequently awarded Koontz $376,154 in damages for the District's temporary taking of his property, which spanned the eleven years during which the District unlawfully withheld permit approval. *Id.* Pet. App. C-1 – C-2. The District appealed. Pet. App. A-7.

On appeal, the District did not argue that its condition requiring Koontz to perform off-site work on its property satisfies *Nollan* and *Dolan*. Pet. App. B-5 – B-6. Instead, the District argued that *Nollan* and *Dolan* apply only to permit approvals that contain unconstitutional conditions—not to permit denials that result from the property owner's refusal to accede to unconstitutional conditions. Because the District issued no permits until after the trial court invalidated the condition, it supposedly imposed no exaction, making *Nollan* and *Dolan* review unavailable to Koontz. Pet. App. B-6. Observing that the argument raised "a question that has evoked considerable debate among academics," the appellate court rejected the District's argument. Pet. App. B-6 – B-7. The court relied on *Dolan*, along with various federal and state supreme court decisions, to conclude that the "essential nexus" and "rough proportionality" tests apply equally to conditions attached to a permit approval and to conditions whose rejection results in a permit denial. Pet. App. B-7 ("Although the *Dolan* majority did not expressly address the issue, the precise argument was

addressed by the dissent and, thus, implicitly rejected by the majority" (citing *Dolan*, 512 U.S. at 408 (Stevens, J., dissenting))).

Moreover, the District unsuccessfully argued that the trial court erred in applying *Nollan* and *Dolan* to a condition requiring Koontz to "expend money to improve land belonging to the District." Pet. App. B-9 – B-10. According to the District, *Nollan* and *Dolan* can be applied only to those land-use exactions that compel a dedication of real property as a condition for permit approval. *Id.* Again, the court recognized that this question is the subject of broad debate and a nationwide split of authority. *Id.* at 10, 11-12, 21-22, 24-27. But, "[a]bsent a more definitive pronouncement from [this Court]," the court of appeal concluded that *Nollan* and *Dolan* apply to all property exactions—without distinction—and upheld the trial court's judgment. *Id.* at 10.

C. The Florida Supreme Court Refuses to Apply *Nollan* and *Dolan* to the District's Permit Condition and Reverses

The Florida Supreme Court accepted the District's petition for review. Pet. App. A-1. The supreme court noted that this Court "has only commented twice on the scope of the *Nollan/Dolan* test," and that "[s]tate and federal courts have been inconsistent with regard to interpretations of the scope of [that test]." Pet. App. A-15, A-17. In light of the lack of definitive guidance from this Court, and the court conflicts regarding the scope of *Nollan* and *Dolan*, the supreme court resigned itself to simply applying a very narrow and cramped interpretation of those cases. Because *Nollan* and

Dolan happened to involve exactions of easements imposed as part of permit approvals, the supreme court held that those cases could apply only to those kinds of exactions. Pet. App. A-18 ("Absent a more limiting or expanding statement from the United States Supreme Court with regard to the scope of *Nollan* and *Dolan*, we decline to expand this doctrine beyond the express parameters for which it has been applied by the High Court."). Importantly, the Florida Supreme Court did not consider the logic or purpose of the "essential nexus" and "rough proportionality" tests set forth in *Nollan* and *Dolan*—*i.e.*, to prevent land-use agencies from engaging in "out-and-out plan[s] of extortion," in whatever form, during the permitting process. *Nollan*, 483 U.S. at 837. Thus, the Florida Supreme Court adopted two per se rules of federal takings law:

> [U]nder the takings clauses of the United States and Florida Constitutions, the *Nollan/Dolan* rule with regard to "essential nexus" and "rough proportionality" is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed.

Pet. App. A-19. The court overturned the lower court's conclusion that the District's refusal to issue the permits effected a temporary regulatory taking. Pet. App. A-21.

Koontz now respectfully asks this Court to issue a writ of certiorari and provide much-needed direction on the important questions of federal law decided below.[3]

REASONS FOR GRANTING THE WRIT

I

THE FLORIDA SUPREME COURT'S REFUSAL TO APPLY *NOLLAN* AND *DOLAN* SCRUTINY TO UNCONSTITUTIONAL EXACTIONS WHOSE REJECTION RESULTS IN PERMIT DENIALS RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD SETTLE

The Florida Supreme Court carved out a massive exception to *Nollan* and *Dolan*: Unconstitutional conditions whose rejection by the property owner results in a permit denial are immune from those decisions' heightened scrutiny. If it stands, the court's opinion threatens to effectively strip millions of Florida property owners of the important protections afforded by *Nollan* and *Dolan*—and the Takings Clause's guarantee that governments are barred "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49

[3] While this case was on appeal, the Estate of Coy A. Koontz, Sr., sold the subject property. The Estate, however, remains the judgment creditor and retains standing to petition the Florida Supreme Court's decision.

(1960). To avoid *Nollan* and *Dolan* under the Florida Supreme Court's decision, land-use agencies carefully will couch their demands for land, money, or labor as conditions precedent to permit approval; in this way, agencies will be able to bully landowners into "agreeing" to otherwise unconstitutional conditions as the heavy price of permit approval.

Three Justices of this Court have made clear that the timing of an otherwise unlawful condition—whether it is imposed before or after permit approval—does not matter. *Lambert v. City & County of San Francisco*, 529 U.S. 1045, 1048 (2000) (Scalia, J., dissenting from denial of cert.). And they have made clear that the relevance of such a distinction raises an important question of federal law "that will doubtless be presented in many cases." *Id.* at 1049.

In *Lambert*, a San Francisco hotel owner sought to convert residential rooms into tourist rooms. As a condition of permit approval, the city demanded that the owner pay $600,000 in mitigation for the lost residential units. The owner refused, and the city denied the permit application. The owner sued the city, challenging the constitutionality of the mitigation requirement under *Nollan* and *Dolan*. The trial and appellate courts ruled against the owner, on the same grounds that the Florida Supreme Court did in this case: Even though there was evidence that the city's permit denial was motivated by the owner's refusal to submit to its $600,000 demand, the courts concluded that, technically, no exaction had been imposed, since the permit had been denied. *Id.* at 1045-46.

This Court denied the property owner's writ of certiorari petition, which generated a three-Justice dissent. Joined by Justices Kennedy and Thomas,

Justice Scalia rejected the distinction between permit denials and approvals, as a basis for applying *Nollan* and *Dolan*. Justice Scalia explained:

> The court's refusal to apply *Nollan* and *Dolan* might rest on the distinction that it drew between the grant of permit subject to an unlawful condition and the denial of a permit when an unconstitutional condition is not met . . . . From one standpoint, of course, such a distinction **makes no sense**. The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process an 'out and out plan of extortion' . . . . There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than a condition subsequent should make a difference.

Id. at 1047-48 (emphasis added); *see also* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 551 (1995) (The nexus and proportionality tests were intended to curtail the "common municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation[.]").

If a land-use agency imposes an exaction as a condition of obtaining permit approval, it still should have to establish the exaction's relationship to the impact of the proposed project. As the Justices observed,

> [w]hen there is uncontested evidence of a demand for money or other property—and

> still assuming that denial of a permit because of failure to meet such a demand constitutes a taking—it should be up to the permitting authority to establish either (1) that the demand met the requirements of *Nollan* and *Dolan*, or (2) that denial would have ensued even if the demand had been met.

529 U.S. at 1047-48.

Neither *Nollan* nor *Dolan* supports the distinction that the Florida Supreme Court made between conditions precedent and conditions subsequent. The question in *Nollan* and *Dolan* was whether the government could lawfully demand property as a condition of development; it was not whether the government's actual taking of property was unlawful. *Nollan*, 483 U.S. at 827; *Dolan*, 512 U.S. at 377. Both cases involved agency decisions that conditioned the issuance of a permit upon the dedication of a property interest to a public use. Neither landowner was required to actually dedicate the demanded property as a prerequisite to asserting a takings claim. *Nollan*, 483 U.S. at 828-30; *Dolan*, 512 U.S. at 382-83. And in both cases, this Court held that the constitutional violation occurred at the moment an unlawful demand was made. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 390. Similarly, Koontz's constitutional claim should not hinge on whether the District actually acquired his labor or money, but on whether the District's demands interfered with his right to make productive use of his property for its intended purpose as commercial land.

Finally, the Florida Supreme Court's distinction between conditions precedent and conditions subsequent ignore the theoretical foundations of

Nollan and *Dolan*. Both are "a special application of the 'doctrine of unconstitutional conditions,'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005), which holds that the government may not withhold a discretionary benefit on the condition that the beneficiary surrender a constitutional right. *See, e.g.*, *Marshall v. Barlow's Inc.*, 436 U.S. 307, 315 (1978) (holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a Florida statute unconstitutional as an abridgment of freedom of the press because it forced a newspaper to incur additional costs by adding more material to an issue or remove material it desired to print). In the context of a land-use exaction, the "government may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit [that] has little or no relationship to the property." *Lingle*, 544 U.S. at 547 (citing *Dolan*, 512 U.S. at 391).

A violation of the unconstitutional conditions doctrine occurs the moment the government demands that a person surrender a constitutional right in exchange for a discretionary government benefit. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1421-22 (1989) (The unconstitutional conditions doctrine is violated "when the government offers a benefit on the condition that the recipient perform or forgo an activity that a preferred constitutional right normally protects from government interference."). Thus, it has never mattered to this Court whether the government

ultimately grants or denies the conditioned benefit. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) (refusal to renew professor's employment contract in retaliation for professor's critical testimony regarding the university's board of regents violated unconstitutional conditions doctrine); *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963) (denial of unemployment benefits held unconstitutional where government required person to "violate a cardinal principle of her religious faith"); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (denial of tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 590, 593-94 (1926) (decision prohibiting use of public highways unless private carrier assumes the duties and burdens of common carrier violated unconstitutional conditions doctrine). Indeed, when formulating the rough proportionality test, this Court relied on a decision that applied an early version of the nexus and proportionality standards to invalidate a permit denial. *See Dolan*, 512 U.S. at 390 n.7 (citing *McKain v. Toledo City Plan Commission*, 270 N.E.2d 370, 374 (Ohio 1971) (Denial of a permit based on failure to dedicate property that was not sufficiently related to the proposed development amounts to a confiscation of private property)).

It should not make any difference, therefore, whether the District approved or denied Koontz's permit. The fact remains that the District violated the Constitution the moment it conditioned permit approval upon the dedication of Koontz's money and labor to a public project that was determined to be wholly unrelated to the impacts of his proposal. The District should not be allowed to dodge liability where,

for over eleven years, it decided to withhold all permit approvals necessary for Koontz to use his property because he refused to accede to the District's unlawful exaction. This Court should grant Koontz's petition to decide this important question.

II

THERE IS A CONFLICT AMONG THE LOWER COURTS ABOUT WHETHER THE *NOLLAN* AND *DOLAN* STANDARDS APPLY TO EXACTIONS OF MONEY OR OTHER PERSONAL PROPERTY

The Florida court held that the nexus and proportionality standards of *Nollan* and *Dolan* can never be applied to dedications of money or other personal property. Pet. App. A-19 - A-21. This issue has been the subject of a significant, nationwide split of authority that has been widening among the state courts of last resort and federal circuit courts of appeals for almost two decades.[4] Pet. App. A-17 - A-18. Most courts find *Nollan* and *Dolan* applicable to all forms of property dedications, including money.[5] A

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[4] This split of authority arose almost immediately after this Court issued its decision in *Dolan* and has continued to grow since then. *See Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (*Dolan* applied to rent stabilization ordinance); *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712 (Md. 1994) (holding that *Dolan* cannot be applied to a monetary exaction).

[5] *See, e.g., Toll Bros., Inc. v. Board of Chosen Freeholders of Burlington*, 944 A.2d 1, 4 (N.J. 2008); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635, 639-40, 641-42 (Tex. 2004); *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d

(continued...)

significant minority, however, hold that the nexus and proportionality tests apply only to dedications of real property.[6] This deep and irreconcilable split of authority is firmly entrenched, and it cannot be resolved without this Court's clarification.

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[5] (...continued)
821, 825 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 697-98 (Colo. 2001); *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353-56 (Ohio 2000); *Benchmark Land Co. v. City of Battleground*, 972 P.2d 944, 950-51 (Wash. Ct. App. 2000) *aff'd*, 49 P.3d 860 (Wash. 2002) (affirmed on non-constitutional grounds); *Dowerk v. Charter Township of Oxford*, 592 N.W.2d 724, 728 (Mich. Ct. App. 1998); *Curtis v. Town of South Thomaston*, 708 A.2d 547, 660 (Me. 1998); *National Association of Home Builders of the United States v. Chesterfield County*, 907 F. Supp. 166, 167 (E.D. Va. 1995), *aff'd*, 92 F.3d 1180 (4th Cir. 1996) (unpublished), *cert. denied*, 519 U.S. 1056 (1997); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); *Trimen Development Co. v. King County*, 877 P.2d 187, 191 (Wash. 1994).

[6] *See e.g.*, *West Linn Corporate Park, LLC v. City of West Linn*, 428 Fed. Appx. 700, 702 (9th Cir.), *cert. denied*, 132 S. Ct. 578 (2011); *West Linn Corporate Park, LLC v. City of West Linn*, 240 P.3d 29, 45 (Or. 2010); *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), *cert. denied*, 556 U.S. 1282 (2009); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 695-97 (Colo. 2001); *Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 548 S.E.2d 595, 603 n.5 (S.C. 2001); *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995); *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712 (Md. 1994).

A. The Florida Court's Rule Conflicts with the Fifth Amendment and the Purpose of *Nollan* and *Dolan*

The choice of some lower courts to carve out certain land-use exactions from constitutional scrutiny, based solely on the type of private property demanded, ignores the plain language of the Takings Clause and this Court's precedents. The Fifth Amendment protects all private property, including money and personal property, from uncompensated takings. U.S. Const. amend. V; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980) (money); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (tangible and intangible goods); *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898) ("[T]he exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, or private property for public use without compensation."). The central question in any *Nollan* and *Dolan* challenge is whether, if the property demand were imposed directly, the government would have to pay just compensation. *Lingle*, 544 U.S. at 547. If so, the demand, whether for real or personal property, falls within the purview of *Nollan* and *Dolan*. *Id.* This question does not turn on the type of property being exacted, but on the impact that the exaction has on Koontz's rights in his private property and the question of who should bear the cost of the District's public improvement projects. *Id.* at 542-43.

As stated above, this Court's application of the unconstitutional conditions doctrine in *Nollan* and *Dolan* was intended to protect against the compelled

waiver of the right to compensation, which occurs whenever the government demands an excessive or unrelated dedication of property in exchange for a permit approval. *Id.* at 547. A rule that the right to just compensation will be safeguarded only when the government targets real property finds no support in this Court's unconstitutional conditions precedents. *See Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways); *Baltic Min. Co. v. Mass.*, 231 U.S. 68, 83 (1913) ("[A] state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without the due process of law[.]"). Nor is the Florida court's rule supported by *Dolan*, which relied on cases that invalidated land-use exactions requiring the applicant to pay for unrelated, off-site public improvement projects when developing the proportionality test. *Dolan*, 512 U.S. 389-90 at n.7 (citing *J.E.D. Assocs. v. Atkinson*, 432 A.2d 12, 15 (N.H. 1981); *Divan Builders v. Planning Bd. of the Township of Wayne*, 334 A.2d 30, 40 (N.J. 1975)).

The fact that *Nollan* and *Dolan* both involved dedications of real property, which if imposed directly would have effected a physical taking, does not dictate the conclusion that any other type of property dedication must be categorically excluded from scrutiny under the nexus and proportionality tests. *Lingle*, 544 U.S. at 547 (explaining that the nexus and proportionality tests were applied to the exactions in *Nollan* and *Dolan* because they involved "dedications of property so onerous that, outside the exactions context, they would be deemed per se physical

takings"). Just like real property, one's money or other personal property can be subject to a physical taking. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32, 234 (2003) (likening a government act compelling the transfer of private funds to a public use to a physical taking); *see also Pioneer Trust & Sav. Bank v. Mt. Prospect*, 176 N.E 799, 801-02 (Ill. 1961) (invalidating a permit condition requiring the developer to dedicate property for recreational and educational facilities because the dedication was the functional equivalent of forcing the landowner to pay for public improvements), (*cited by Dolan*, 512 U.S. 389-90 at n.7). Accordingly, this Court has never limited the nexus and proportionality tests to dedications of real property; instead, it has consistently explained that *Nollan* and *Dolan* apply to a "dedication of property," "dedication of private property," or "excessive exactions." *See Lingle*, 544 U.S. at 547; *Del Monte Dunes*, 526 U.S. at 702-03; *Dolan*, 512 U.S. at 390. Many lower courts, nonetheless, continue to hold to the contrary.

Moreover, the Florida court's conclusion that *Nollan* and *Dolan* apply only to compelled dedications of real property cannot be squared with this Court's grant of certiorari and remand in *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 1743 (1993), *vacated and remanded*, 512 U.S. 1231 (1994). In *Ehrlich*, the owner of a private tennis club and recreational facility applied to the City of Culver City for an amendment to a general plan, a zoning change, and amendment of the specific plan to allow replacement of the tennis club and recreational facility with a condominium complex. *Id.* The City approved the application conditioned upon the payment of

certain monetary exactions, including a $280,000 fee to pay a portion of the cost of replacing the lost recreational facilities. *Id.* The California appellate court rejected the property owner's *Nollan*-based regulatory takings challenge, holding that monetary exactions are not subject to heightened scrutiny under the nexus test. *Id.* This Court granted certiorari, vacated the lower court's judgment, and remanded the case for consideration under *Dolan*. *Ehrlich*, 512 U.S. at 1231. On remand, the California Supreme Court held that the nexus and proportionality tests apply equally to land-use exactions that require a property owner to dedicate land or pay fees. 911 P.2d 429, 444 (Cal. 1996) ("[I]t matters little whether the local land use permit authority demands the actual conveyance of the property or the payment of a monetary exaction."); *see also San Remo Hotel v. City & County of San Francisco*, 41 P.3d 87, 102 (Cal. 2002) ("Though the members of this court disagreed on various parts of the analysis, we unanimously held that this ad hoc monetary exaction was subject to *Nollan/Dolan* scrutiny.").

Since *Ehrlich*, however, this Court has denied every petition for a writ of certiorari asking whether *Nollan* and *Dolan* apply to non-real property exactions. These petitions included cases where the lower court applied *Nollan* and *Dollan* to a monetary exaction and in cases where the lower court refused to subject such exactions to the nexus and proportionality tests. *See, e.g.*, *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821, 825 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004) (*Dolan*'s rough proportionality test applies to an exaction of park fees); *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), *cert. denied*, 129 S. Ct.

2765 (2009) (holding that *Nollan* and *Dolan* are limited to dedications of real property). Faced with an irreconcilable conflict on a question of federal takings law, lower courts, like the Florida court below, have repeatedly indicated that, due to a lack of guidance from this Court, they are simply having to choose sides in a deepening split of authority. Pet. App. A-19; Pet. App. B at 10-12, 21-22, 24-27; *see also West Linn Corporate Park, LLC v. City of West Linn*, 240 P.3d 29, 45 (Or. 2010), *cert. denied*, 132 S. Ct. 181 (2011) (explaining that, without guidance from the U.S. Supreme Court, it would strictly limit *Nollan* and *Dolan* to their facts). This is a wholly inappropriate basis upon which to deny a person's right to seek compensation for a violation of his or her rights under the Takings Clause and warrants certiorari.

B. *Del Monte Dunes* Did Not Limit *Nollan* and *Dolan*

Confusion about whether *Nollan* and *Dolan* apply to exactions of personal property is driven primarily by this Court's discussion of the nexus and proportionality tests in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999); Pet. App. A-18 - A-19. In *Del Monte Dunes*, a property owner submitted a series of applications for a permit to build a multi-family residential complex on a coastal property zoned for such use. 526 U.S. at 695-98. The city delayed and denied every permit application for a variety of reasons (*id.*), and the landowner sued alleging two different regulatory takings theories: (1) that the reasons the city provided for its denials lacked a sufficient nexus to the government's stated objectives under *Nollan*; and (2) that the permit denial deprived the property owner of all economically viable

use under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).[7] *Del Monte Dunes*, 526 U.S. at 700-01.

The jury delivered a general verdict that the government's actions effected a temporary regulatory taking and awarded compensation. *Id.* The Ninth Circuit Court of Appeals upheld the verdict, concluding that there was sufficient evidence in the record to support the jury's verdict on either regulatory takings theory. *Id.* at 701-02 (citing *Del Monte Dunes*, 95 F.3d at 1430-34). In doing so, however, the Ninth Circuit posited that the evidence could have also established a violation of *Dolan*'s rough proportionality test. This Court granted certiorari, in part, to determine whether the Ninth Circuit "erred in assuming that the rough-proportionality standard of [*Dolan*] applied to this case." *Id.* at 702.

This Court briefly discussed the rough proportionality test, noting that, although all regulatory takings claims include consideration of whether the burden being placed on a landowner is proportional, *Dolan*'s "rough proportionality" test was specifically developed to address excessive land-use exactions and was not readily applicable to cases where the landowner challenges the application of a general land use regulation to deny a permit application. *Id.* at 703 (*Dolan* "was not designed to address, and is not readily applicable to . . . [a situation where] the landowner's challenge is based not on

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[7] While Del Monte Dune's lawsuit was pending, the city purchased the property. 526 U.S. at 700. Accordingly, the property owner's claims were considered as alleging a temporary taking. *Id.* at 704; *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 95 F.3d 1422, 1425-26 (9th Cir. 1996).

excessive exactions but on denial of development."); *see also id.* at 733 (Souter, J., concurring in part and dissenting in part) (agreeing with lead opinion "in rejecting extension of 'rough proportionality' as a standard for reviewing land-use regulations generally"). Ultimately, however, this Court held that it was unnecessary to address whether the Ninth Circuit erred when it considered *Dolan* because there was substantial evidence on the record demonstrating that the city's decision to deny the permit lacked a sufficient nexus to the government's stated objectives:[8]

> Del Monte provided evidence sufficient to rebut each of [the City's] reasons [for denying the final proposal]. Taken together, Del Monte argued that the City's reasons for denying their application were invalid and that it unfairly intended to forestall any reasonable development of the [property]. In light of evidence proffered by Del Monte, the City has incorrectly argued that no rational juror could conclude that the City's denial of Del Monte Dune's application lacked a sufficient nexus with its stated objective.

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[8] The decision speaks to both *Nollan*'s nexus requirement and the requirement that the decision substantially advance a legitimate government interest. *Del Monte Dunes*, 526 U.S. at 701, 704. In *Lingle*, this Court excised the "substantially advances" requirement from the nexus and proportionality tests. *Lingle*, 544 U.S. at 545-48 (The question whether a regulation substantially advances a legitimate government interest is properly part of a due process analysis; it "has no proper place in our takings jurisprudence."). The "substantially advance a legitimate government" inquiry is now properly considered as part of a due process analysis. *Lingle*, 544 U.S. at 545-48.

Id. at 703 (quoting *Del Monte Dunes*, 95 F.3d at 1431-32).

Just like *Del Monte Dunes*, the trial court in this case concluded that the District's proffered reason for denying Koontz's permit applications—his refusal to accede to the off-site improvement condition—lacked the required nexus linking the project impacts to the government's stated objectives:

> St. Johns Water Management District did not prove the necessary relationship between the condition of off-site mitigation and the effect of development. There was neither a showing of nexus between the required off-site mitigation and the requested development of the tract, nor was there a showing of rough proportionality to the impact of site development. . . . St. Johns District's required conditions of unspecified but substantial off-site mitigation resulted in a regulatory taking. It is the opinion of this Court that the denial of the Koontz permit application by the St. Johns Water Management District was invalid[.]

Pet. App. D-11. Koontz clearly stated a cognizable claim for a regulatory taking under this Court's precedents and the Takings Clause of the U.S. Constitution. *Lingle*, 544 U.S. at 548 ("[A] plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . by alleging . . . a land-use exaction violating the standards set forth in *Nollan* and *Dolan*."); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (Temporary takings "are not different in kind from permanent takings, for

which the Constitution clearly requires compensation. The only difference is that a temporary taking puts private property to public use for a limited period of time.").

The Florida court, however, focused narrowly on the one sentence from *Del Monte Dunes* where this Court explained that it had not applied the proportionality test outside the context of land-use exactions, to hold that *Del Monte Dunes* had "specifically limited the scope of *Nollan* and *Dolan* to those exactions that involve[] the dedication of real property for a public use." Pet. App. A-19; *see also McClung*, 548 F.3d at 1227 (citing *Del Monte Dunes* as having limited *Nollan* and *Dolan*); *Sea Cabins*, 548 S.E.2d at 603 n.5 (same). By overlooking the actual holding of *Del Monte Dunes*, the Florida court reached an opposite conclusion on facts similar to those in *Del Monte Dunes*. The decision below creates more confusion on a constitutional test that is already the subject of a deeply entrenched split of authority and warrants certiorari.

C. Resolving the Split of Authority Is Necessary and Warranted in This Case

This petition provides the Court with a good opportunity to address the split of authority on the scope of *Nollan* and *Dolan* because it presents the issue as a pure question of law. There is no question that, if *Nollan* and *Dolan* apply to the District's off-site improvement demand, a taking occurred. The petition, therefore, squarely asks whether *Nollan* and *Dolan* apply to development conditions that compel a landowner to dedicate his or her personal property to

the public. This question arises frequently, particularly in regard to conditions compelling an applicant to make off-site public improvements, and is the subject of a nationwide split of authority. *See, e.g.*, *Toll Bros., Inc. v. Board of Chosen Freeholders of Burlington*, 944 A.2d 1, 4 (N.J. 2008) (The government "may only impose off-tract improvements on a developer if they are necessitated by the development."); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635, 639-42 (Tex. 2004) ("For purposes of determining whether an exaction as a condition of governmental approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved."); *West Linn Corporate Park, LLC v. City of West Linn*, 428 Fed. Appx. 700, 702 (9th Cir. 2011) (nexus and proportionality tests do not apply to an exaction requiring landowner to dedicate money to off-site public improvements). And several lower courts, including the Florida court below, have indicated that they will not reconsider their positions on this question unless and until this Court clarifies that the nexus and proportionality tests protect all private property. Pet. App. A-19; *West Linn*, 240 P.3d at 45.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: June, 2011.

Respectfully submitted,

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Appendix A–1

Supreme Court of Florida

No. SC09-713

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Petitioner,

vs.

COY A. KOONTZ, etc.,

Respondent.

[November 3, 2011]

LEWIS, J.

This case is before the Court for review of the decision of the Fifth District Court of Appeal in *St. Johns River Water Management District v. Koontz*, 5 So. 3d 8 (Fla. 5th DCA 2009) (*Koontz IV*). In its decision, the Fifth District construed provisions of the state and federal constitutions. The district court also certified a question to be of great public importance, which we have rephrased as follows:

> DO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE X, SECTION 6(a) OF THE FLORIDA CONSTITUTION RECOGNIZE AN EXACTIONS TAKING UNDER THE HOLDINGS OF *NOLLAN V. CALIFORNIA COASTAL COMMISSION*, 483 U.S. 825 (1987), AND *DOLAN V. CITY OF TIGARD*, 512 U.S. 374 (1994), WHERE THERE IS NO COMPELLED DEDICATION OF ANY INTEREST IN REAL PROPERTY TO

PUBLIC USE AND THE ALLEGED EXACTION IS A NON LAND-USE MONETARY CONDITION FOR PERMIT APPROVAL WHICH NEVER OCCURS AND NO PERMIT IS EVER ISSUED?[1]

We have jurisdiction. *See* art. V, § 3(b)(3)-(4), Fla. Const.

We rephrase the certified question to reflect that the issue presented by this case is controlled by the existing interpretation of the United States Constitution by the United States Supreme Court. This Court has previously interpreted the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution coextensively. *See, e.g., Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994) ("We

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[1] The original certified question provided:

> WHERE A LANDOWNER CONCEDES THAT PERMIT DENIAL DID NOT DEPRIVE HIM OF ALL OR SUBSTANTIALLY ALL ECONOMICALLY VIABLE USE OF THE PROPERTY, DOES ARTICLE X, SECTION 6(a) OF THE FLORIDA CONSTITUTION RECOGNIZE AN EXACTION TAKING UNDER THE HOLDINGS OF *NOLLAN* [n.1] AND *DOLAN* [n.2] WHERE, INSTEAD OF A COMPELLED DEDICATION OF REAL PROPERTY TO PUBLIC USE, THE EXACTION IS A CONDITION FOR PERMIT APPROVAL THAT THE CIRCUIT COURT FINDS UNREASONABLE?

[N.1.] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[N.2.] *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

Koontz IV, 5 So. 3d at 22.

acknowledge that in striking down the offending portion of the statute in *Joint Ventures*, we referred to the takings clauses of our state and federal constitutions."); *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622, 623 (Fla. 1990) ("We answer the question in the affirmative, finding those subsections invalid as a violation of the fifth amendment to the United States Constitution and article X, section 6(a) of the Florida Constitution."). We also rephrase the question to address the two actual factors to which the doctrine of exactions was expanded by the Fifth District—application of the doctrine to an alleged exaction that does not involve the dedication of an interest in or over real property; and application of the doctrine where an exaction does not occur and no permit is issued by the regulatory entity.

For the reasons expressed below, we answer the rephrased question in the negative and quash the decision under review.

BACKGROUND

This case has an extended procedural history. Prior to the issuance of the decision that is currently before the Court, issues related to the regulation of this property were before the Fifth District Court of Appeal on three occasions. During the first appeal, the Fifth District reversed a determination by the trial court that the claim of Coy A. Koontz, Sr. (Mr. Koontz) was not ripe for adjudication and remanded the matter for a trial on whether the actions of the St. Johns River Water Management District (St. Johns) effected a taking of Mr. Koontz's property. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560, 562 (Fla. 5th DCA 1998) (*Koontz I*), *review denied*, 729 So. 2d 394 (Fla. 1999). After the trial court determined

that a taking had occurred, St. Johns twice attempted to appeal that determination, but the Fifth District dismissed both appeals, concluding that the orders issued by the trial court did not constitute final orders or appealable non-final orders. *See St. Johns River Water Mgmt. Dist. v. Koontz*, 861 So. 2d 1267, 1268 (Fla. 5th DCA 2003) (*Koontz II*); *St. Johns River Water Mgmt. Dist. v. Koontz*, 908 So. 2d 518, 518 (Fla. 5th DCA 2005) (*Koontz III*). After the trial court entered a judgment assessing damages in favor of Coy A. Koontz, Jr., as personal representative of the Estate of Mr. Koontz, St. Johns filed an appeal to review that judgment. *See Koontz IV*, 5 So. 3d at 8.

The decision resulting from that appeal in *Koontz IV* provides the following background:

> This case involves a landowner, Mr. Koontz, who, in 1994, requested permits from [St. Johns] so that he could develop a greater portion of his commercial property than was authorized by existing regulation. . . . Based on the permit denial, Mr. Koontz brought an inverse condemnation claim asserting an improper "exaction" by [St. Johns].
>
> In the most general sense, an "exaction" is a condition sought by a governmental entity in exchange for its authorization to allow some use of land that the government has otherwise restricted. Even though the government may have the authority to deny a proposed use outright, under the exactions theory of takings jurisprudence, it may not attach arbitrary conditions to issuance of a permit.

In relating the circumstances giving rise to this case, the trial court explained:

> The subject property is located south of State Road 50, immediately east of the eastern extension of the East-West Expressway in Orange County. The original plaintiff, Coy Koontz, has owned the subject property since 1972. In 1987, a portion of the original acreage[2] adjacent to Highway 50 was condemned, leaving Mr. Koontz with 14.2 acres. There is a 100-foot wide transmission line easement of Florida Power Corporation running parallel to and about 300 feet south of Highway 50, that is kept cleared and mowed by Florida Power. . . .
>
> . . . .
>
> All but approximately 1.4 acres of the tract lies within a Riparian Habitat Protection Zone (RHPZ) of the Econlockhatchee River Hydrological Basin and is subject to jurisdiction of the St. Johns River Water Management District.
>
> In 1994, Koontz sought approval from [St. Johns] for a 3.7 acre development area adjacent to Highway 50, of which 3.4 acres were wetlands and .3 acres were uplands.

In his concurring opinion in *Koontz II*, Judge Pleus explained the positions [advanced] by the parties during the permit approval process:

> Koontz proposed to develop 3.7 acres closest to Highway 50, back to and including the power line easement. In order to develop his

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[2] Mr. Koontz owned a total of 14.9 acres in Orange County. *See Koontz I*, 720 So. 2d at 561.

> property, he sought a management and storage of surface waters permit to dredge three and one quarter acres of wetlands. A staffer from St. Johns agreed to recommend approval if Koontz would deed the remaining portion of his property into a conservation area and perform offsite mitigation by either replacing culverts four and one-half miles southeast of his property or plug certain drainage canals on other property some seven miles away. Alternatively, St. Johns demanded that Koontz reduce his development to one acre and turn the remaining 14 acres into a deed-restricted conservation area. Koontz agreed to deed his excess property into conservation status but refused St. Johns' demands for offsite mitigation or reduction of his development from three and seven-tenths acres to one acre. Consequently, St. Johns denied his permit applications.

Id. at 1269 (Pleus, J., concurring specially). In its orders denying the permits, [St. Johns] said that Mr. Koontz's proposed development would adversely impact Riparian Habitat Protection Zone ["RHPZ"] fish and wildlife, and that the purpose of the mitigation was to offset that impact.

After hearing conflicting evidence, the trial court concluded that [St. Johns] had effected a taking of Mr. Koontz's property . . . . In reaching this conclusion, the trial court applied the constitutional standards enunciated by the Supreme Court in *Nollan* and *Dolan*. In *Nollan*, with respect to discretionary decisions to issue permits, the Supreme Court held that the

government could impose a condition on the issuance of the permit without effecting a taking requiring just compensation if the condition "serves the same governmental purpose as the developmental ban." 483 U.S. at 837. This test is referred to as the "essential nexus" test. In *Dolan*, the Court added the requirement that, for such a condition to be constitutional, there must also be a "rough proportionality" between the condition and the impact of the proposed development. 512 U.S. at 390-91.

Koontz IV, 5 So. 3d at 9-10 (footnotes omitted) (citations omitted).

After the circuit court determined that St. Johns had effected a taking of Mr. Koontz's property, statutory law required St. Johns to take one of three possible actions: (a) agree to issue the permit; (b) agree to pay damages; or (c) agree to modify its decision to avoid an unreasonable exercise of police power. *See* § 373.617(3), Fla. Stat. (2002). Here, St. Johns chose to issue the permits to Mr. Koontz after it received additional evidence which demonstrated that the amount of wetlands on Mr. Koontz's property was significantly less than originally believed. The circuit court subsequently awarded Mr. Koontz $376,154 for a temporary taking of his property by St. Johns.

On appeal, St. Johns first contended that the trial court lacked subject matter jurisdiction to consider Mr. Koontz's exactions claim because the statute under which the claim was asserted, section 373.617, Florida Statutes (1993), limited circuit court review to cases in which a constitutional taking has actually occurred. *See Koontz IV*, 5 So. 3d at 10. St. Johns asserted that although an exactions claim is a form of taking and is cognizable under section 373.617, no exaction occurred

here because nothing had been taken from Mr. Koontz. *See id.* at 10-11. The original limitations applicable to the property were never challenged. The Fifth District Court of Appeal framed this challenge as "whether an exaction claim is cognizable when, as here, the land owner refuses to agree to an improper request from the government resulting in the denial of the permit." *Id.* at 11. The district court concluded that the United States Supreme Court had implicitly determined in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), that an exaction occurs under such circumstances. *See* 5 So. 3d at 11.

St. Johns also contended that an action for inverse condemnation lacked merit because the condition proposed by St. Johns did not involve a physical dedication of land but instead would have caused Mr. Koontz to expend money for improvement of land belonging to St. Johns if accepted. *See id.* at 12. The Fifth District Court of Appeal also rejected this assertion and concluded that the United States Supreme Court had implicitly decided this issue adverse to St. Johns in *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994). *See* 5 So. 3d at 12. In *Ehrlich*, the United States Supreme Court vacated a lower court decision that approved the conditioning of a permit on the payment of money to build tennis courts and purchase artwork and remanded the case for reconsideration in light of *Dolan*. *See id.* (citing *Ehrlich*, 512 U.S. 1231). The Fifth District concluded that in the absence of a more definite pronouncement from the United States Supreme Court on this issue, the distinction advanced by St. Johns was not legally significant. *See Koontz IV*, 5 So. 3d at 12. The Fifth

District affirmed the trial court judgment awarding compensation to Mr. Koontz. *See id.*

In dissent, Judge Griffin asked, "[i]n what parallel legal universe or deep chamber of Wonderland's rabbit hole could there be a right to just compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none ever given up by the owner?" *Id.* at 20 (Griffin, J., dissenting). Judge Griffin asserted that whether a taking has occurred depends on whether a landowner gives up any protected interest in his or her land:

> If [a protected interest is given up], whether temporarily or permanently, the landowner is entitled to compensation as set forth in the "taking" cases. If, however, the unconstitutional condition does not involve the taking of an interest in land, the remedy of inverse condemnation is not available. In this case, the objected-to condition that was found to be an exaction was not an interest in land; it was the requirement to perform certain off-site mitigation in the form of clean-up of culverts and ditches to enhance wetlands several miles away.

Id. at 18 (Griffin, J., dissenting). Judge Griffin also reasoned that whether a condition that has been rejected can constitute a taking was not resolved in *Dolan*, and that a taking does not occur under such circumstances:

> In this case, if Mr. Koontz had given in to [St. Johns'] condition, gotten his development permit and done the off-site mitigation, he

> would be entitled to recover the value of the off-site mitigation. If he elected to refuse the offer, he had a judicial remedy to invalidate the condition . . . . The parcel of land for which he sought the development permit was not, however, in any wise "taken" by [St. Johns]. The only way a "taking" can even be conceptualized in such a circumstance is by adopting the view that by proposing an "unconstitutional condition" that was rejected, [St. Johns] forfeited its right (and duty) to protect the public interest to refuse the permit at all.

Id. at 20-21 (Griffin, J., dissenting).

St. Johns subsequently filed a motion for certification, which the Fifth District Court of Appeal granted. *See id.* at 22. The district court then certified a question to this Court as one of great public importance.

ANALYSIS

Standard of Review and Constitutional Provisions

As a preliminary matter, the interpretation of a constitutional provision is a question of law that is reviewed de novo. *See Fla. Dep't of Rev. v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005).

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. *See* amend. V, U.S. Const. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The purpose behind the takings

doctrine is to prevent government from forcing an individual to bear burdens that should be carried by the public as a whole. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). The takings provision of the Florida Constitution provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Art. X, § 6(a), Fla. Const. As previously discussed, this Court has interpreted the takings clauses of the United States and Florida Constitutions coextensively. *See A.G.W.S. Corp.*, 640 So. 2d at 58; *Joint Ventures*, 563 So. 2d at 623.

Takings Under Supreme Court Case Law

The United States Supreme Court has stated that the takings clause of the Fifth Amendment does not prohibit the taking of private property by the government, but instead places conditions on the exercise of that power. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). The clause is not intended to limit government interference with property rights, but rather to secure compensation where otherwise proper interference amounts to a taking. *See id.* at 315.

Outside the special context of land-use exactions (discussed below), the United States Supreme Court has recognized two types of regulatory actions that generally constitute *per se* takings under the Fifth Amendment. First, if government action causes a permanent physical invasion of private property, the government must provide just compensation to the owner of the property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (taking occurred where state law required landlords to allow

cable companies to install cable equipment in their apartment buildings). Second, a government regulation that completely deprives an owner of all economically beneficial use of his or her property effects a Fifth Amendment taking. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). In *Lucas*, the United States Supreme Court held that the government must pay just compensation for such "total regulatory takings," *id.* at 1026, except to the extent that the owner's intended use of his or her property is restricted by nuisance and property law. *See id.* at 1026-32.

Aside from regulations that allow physical invasions of private property or deprive a property owner of all beneficial property use, regulatory takings challenges are governed by the standard articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The United States Supreme Court in *Penn Central* acknowledged that it had previously been unable to establish any "set formula" for evaluating regulatory takings claims, but identified a number of factors that have particular significance. *Id.* at 124. The United States Supreme Court stated that the primary factor to consider is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* The Supreme Court also concluded that the character of the governmental action, such as whether the action constitutes a physical invasion or merely impacts property interests, can be relevant to a determination of whether a taking has occurred. *See id.* The *Penn Central* standard has served as the principal guide for assessing allegations that a regulatory taking has

occurred where the government action does not fall within the physical-invasion or *Lucas* takings categories.

With regard to the doctrine of exactions, in the late 1980s and early-to-mid 1990s, the United States Supreme Court issued two decisions, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a California case that involved a beach pass-through easement, and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), an Oregon case that involved storm-water and bike-path land dedications. These cases arose from landowner requests for building permits to expand the structures located on their real property. In response, the pertinent governmental entities approved the permits, but conditioned that approval on the receipt of exactions.

In *Nollan*, the California Coastal Commission approved the Nollans' request for a building permit subject to the dedication of an easement that would allow the public to pass across the beach that was owned by the Nollans behind their home. *See* 483 U.S. at 828. The Nollans proceeded to build their expanded home but legally contested the exaction imposed as an uncompensated taking. *See id.* at 828-30. On certiorari review, the United States Supreme Court articulated an "essential nexus" test, which required a government entity to establish that the condition imposed for approval of a building permit (i.e., the exaction) served the same public purpose that would have supported a total ban of the proposed development. *See* 483 U.S. at 836-37. Thus, if (as the Commission asserted) the public's right to view the shore from the street was the supporting reason for denying the Nollans' permit, the proposed

condition/exaction must directly relate to and further this supporting reason. *See id.* at 835-38. For example, a height restriction on the proposed development to preserve the view corridor might satisfy the requirement. *See id.* at 836. However, the easement at issue in *Nollan*, which would allow members of the public to pass across beach owned by the Nollans, failed this test because the right of the public to view the shore from a nearby street was not served by the ability of individuals to traverse up and down the Nollans' beach property. *See id.* at 838-39. Thus, the United States Supreme Court concluded that if the State of California desired an easement across the Nollans' property, the State must pay compensation for that easement. *See id.* at 841-42.

On certiorari review in *Dolan*, the Court expanded upon *Nollan* to not only require an "essential nexus" between the permit-approval condition upon the land and the alleged public problem caused by the proposed development, but also to require "rough proportionality" between the condition placed on the land and the extent of the impact of the proposed development. *See* 512 U.S. at 391. For example, where (as in *Dolan*) one asserted impact of the development was increased traffic congestion, and the permit-approval condition on the property was the dedication of land for a bike path, the government must demonstrate that the additional number of vehicle and bicycle trips generated by the development are reasonably related to the government's requirement for dedication of a bicycle path easement over the property. *See id.* at 387-88, 395-96. Similar to *Nollan*, the government entity in *Dolan* approved the requested permit subject to contested conditions on

the land (i.e., storm-water and bike-path land dedications), and the landowner filed an action claiming that these conditions over the land constituted uncompensated takings. *See Dolan*, 512 U.S. at 379-83.

In the sixteen years since the Supreme Court issued *Dolan*, the High Court has only commented twice on the scope of the *Nollan/Dolan* test. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999), the developer submitted nineteen different site plans to the City of Monterey for development of an oceanfront parcel of land. Each time, the city rejected the plan and imposed even more rigorous conditions upon the developer. *See id.* at 697-98. When the developer concluded that the city would not permit development under any circumstances, it filed suit in federal court contending that the final denial of development constituted a regulatory taking of the property. *See id.* at 698. The United States Supreme Court concluded that the *Nollan/Dolan* exactions standard was inapplicable to the actions of the city:

> [W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use. *See Dolan*, [512 U.S.] at 385; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987). The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and

> is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.

Id. at 702-03 (emphasis supplied).

More recently, in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), the United States Supreme Court rejected a takings test that it had previously adopted in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). *See Lingle*, 544 U.S. at 548 ("We hold that the . . . substantially advances formula is not a valid takings test . . . ."). The *Agins* standard had been mentioned in both *Nollan* and *Dolan*, which caused the Supreme Court to expressly note that its rejection of that standard had no impact on the holdings of these two more recent cases. *See id.* at 546-48.

In the context of this discussion, the Supreme Court reasoned that *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions—more specifically, government demands that landowners *dedicate easements* over their land to allow the public access across their property as a condition of obtaining development permits. *See id.* at 546. The Court further stated that it refined the *Nollan* "essential nexus" test in *Dolan* by holding that an adjudicative exaction *requiring dedication of private property* must also be " . . . rough[ly] proportiona[l]" . . . both in nature and extent to the impact of the proposed development." 512 U.S., at 391; *see also Del Monte Dunes, supra*, at 702

(emphasizing that we have not extended this standard "beyond the special context of [such] exactions"). *Id.* at 547 (alterations in original) (emphasis supplied).

The Scope of the *Nollan/Dolan* Test

State and federal courts have been inconsistent with regard to interpretations of the scope of the *Nollan/Dolan* test, even after the decisions in *Del Monte Dunes* and *Lingle*. The divide is most clearly evident on the issue of whether the test applies to conditions that do not involve the dedication of land or conditions imposed upon the land.

One line of cases holds that the *Nollan/Dolan* standard applies solely to exactions cases involving land-use dedications. *See, e.g., McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008) (distinguishing monetary conditions from conditions on the land); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995); *Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 548 S.E.2d 595, 603 n.5 (S.C. 2001) (holding that *Del Monte Dunes* clarified that *Nollan* and *Dolan* only apply to physical conditions imposed upon land).

The other line of cases holds that the *Nollan/Dolan* test extends beyond the context of the imposition of real property conditions on real property. For example, the California Supreme Court has held that non-real property conditions can constitute a taking where the condition is imposed on a discretionary, individualized basis. *See Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996). However, in *Town of Flower Mound v. Stafford Estates Ltd Partnership*, 135 S.W.3d 620, 640-41 (Tex. 2004), the Texas Supreme Court expanded application of the

test further, holding that *Nollan* and *Dolan* can apply to certain non-real property conditions that arise from generally applicable regulations.

Despite the varied interpretations of the scope of *Nollan/Dolan*, we must follow the decisions of the United States Supreme Court with regard to Fifth Amendment takings jurisprudence. *See Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 220-21 (1931) (state courts are bound by United States Supreme Court's interpretations of federal law); *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007) (state courts are generally not bound by the decisions of the lower federal courts on questions of federal law). Moreover, the Supreme Court itself has specifically stated that when it denies certiorari review, that denial "imports no expression of opinion upon the merits of the case." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)). Thus, we decline to interpret a decision of the United States Supreme Court not to review a case that addresses an exactions issue as an approval of the merits or holding of the underlying decision in that case.

Instead, we are guided only by decisions in which the Supreme Court has expressly applied, or commented upon the scope of, exactions takings. *Nollan* and *Dolan* both involved exactions that required the property owner to dedicate real property in exchange for approval of a permit. *See Dolan*, 512 U.S. at 380; *Nollan*, 483 U.S. at 827. Additionally, in both cases the regulatory entities issued the permits sought with the objected-to exactions imposed. *See Dolan*, 512 U.S. at 379; *Nollan*, 483 U.S. at 828. Moreover, in *Del Monte Dunes* and *Lingle*, the United

States Supreme Court specifically limited the scope of *Nollan* and *Dolan* to those exactions that involved the dedication of real property for a public use. *See Lingle*, 544 U.S. at 546-47; *Del Monte Dunes*, 526 U.S. at 702-03. Absent a more limiting or expanding statement from the United States Supreme Court with regard to the scope of *Nollan* and *Dolan*, we decline to expand this doctrine beyond the express parameters for which it has been applied by the High Court.[3]

Accordingly, we hold that under the takings clauses of the United States and Florida Constitutions, the *Nollan/Dolan* rule with regard to "essential nexus" and "rough proportionality" is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed.

It is both necessary and logical to limit land-use exactions doctrine to these narrow circumstances. Governmental entities must have the authority and

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[3] Our holding today is consistent with the 2011 decisions of two federal appellate courts, both of which held that *Nollan* and *Dolan* are inapplicable to cases that do not involve the dedication of real property for a public use. *See Iowa Assurance Corp. v. City of Indianola*, 650 F.3d 1094, 1096-97 (8th Cir. 2011) (ordinance which required an enclosed fence to surround areas where two or more race cars are present not subject to a *Nollan/Dolan* exactions analysis); *West Linn Corporate Park, LLC v. City of West Linn*, 428 F. App'x 700, 702 (9th Cir. 2011) (refusing to extend *Nollan/Dolan* where city required developer to construct several off-site public improvements but did not require dedication of developer's interest in real property), *petition for cert.* filed, 80 U.S.L.W. 3135 (U.S. Sept. 6, 2011) (No. 11-299).

flexibility to independently evaluate permit applications and negotiate a permit award that will benefit a landowner without causing undue harm to the community or the environment. If a property owner is authorized to file an inverse condemnation claim on the basis of the exactions theory any time regulatory negotiations are not successful and a permit is denied, two undesirable outcomes inevitably ensue. First, the regulation of land use, deemed by the United States Supreme Court to be "peculiarly within the province of state and local legislative authorities," would become prohibitively expensive. *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975); *see also Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002) ("Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford.").

Second, and as a result of the first consequence, agencies will opt to simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation. Property owners will have no opportunity to amend their applications or discuss mitigation options because the regulatory entity will be unwilling to subject itself to potential liability. Land development in certain areas of Florida would come to a standstill. We decline to approve a rule of law that would place Florida land-use regulation in such an unduly restrictive position.

Based on the above analysis, we conclude that the Fifth District in *Koontz IV* erroneously applied the *Nollan/Dolan* exactions test to the offsite mitigation

proposed by St. Johns. Since St. Johns did not condition approval of the permits on Mr. Koontz dedicating any portion of his interest in real property in any way to public use, this analysis does not apply. Further, even if we were to conclude that the *Nollan/Dolan* test applied to non-real property exactions—which we do not—Mr. Koontz would nonetheless fail in his exactions challenge because St. Johns did not issue permits, Mr. Koontz never expended any funds towards the performance of offsite mitigation, and nothing was ever taken from Mr. Koontz. As noted by the United States Supreme Court, *Nollan* and *Dolan* were not designed to address the situation where a landowner's challenge is based not on excessive exactions but on a denial of development. *See Del Monte Dunes*, 526 U.S. at 703. Here, all that occurred was that St. Johns did not issue permits for Mr. Koontz to develop his property based on existing regulations and, therefore, an exactions analysis does not apply. *See id.* ("[T]he rough-proportionality test of *Dolan* is inapposite to a case such as this one.").

CONCLUSION

Based on our analysis in this case, we answer the rephrased certified question in the negative, quash the decision of the Fifth District in *Koontz IV*, and remand for proceedings consistent with this opinion. We emphasize that our decision today is limited solely to answering the rephrased certified question. We decline to address the other issues raised by the parties.

It is so ordered.

PARIENTE, LABARGA, and PERRY, JJ., concur. QUINCE, J., concurs in result only. POLSTON, J.,

concurs in result only with an opinion, in which CANADY, C.J., concurs. NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

POLSTON, J., concurring in result only.

I agree with St. Johns River Water Management District's argument that underlying the landowner's claim for regulatory taking is an attack on the propriety of agency action. Therefore, under these circumstances, the landowner is required to exhaust administrative remedies under chapter 120, Florida Statutes, before bringing this regulatory taking action pursuant to section 373.617, Florida Statutes. *See* § 373.617(2), Fla. Stat. (2002) ("Review of final agency action for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence shall proceed in accordance with chapter 120."); *Key Haven Associated Enters., Inc. v. Bd. of Trs. of the Internal Improvement Trust Fund*, 427 So. 2d 153, 159 (Fla. 1982).

Accordingly, I would quash the Fifth District's opinion but not reach the certified questions as phrased by the Fifth District or the majority.

CANADY, C.J., concurs.

Application for Review of the Decision of the District Court of Appeal Certified Great Public Importance

Fifth District - Case No. 5D06-1116

(Orange County)

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for Respondent

Harry Morrison, Jr. and Kraig A. Conn, Tallahassee, Florida, Virginia Saunders Delegal, on behalf of Florida Association of Counties, Inc. and Florida League of Cities, Inc.; Pamela Jo Bondi, Attorney General, Scott D. Makar, Solicitor General, and Courtney Brewer, Deputy Solicitor General, Tallahassee, Florida, on behalf of the Attorney General, Thomas M. Beason, General Counsel and Meredith C. Fields, Assistant General Counsel, Tallahassee, Florida, on behalf of Florida Department of Environmental Protection, Kevin X. Crowley of Pennington Moore, Wilkinson, Bell and Dunbar, P.A., Tallahassee, Florida, on behalf of the Northwest Florida Water Management District, William S. Bilenky General Counsel, and Joseph J. Ward, Assistant General Counsel, Brooksville, Florida, on behalf of the South Florida Water Management District, and the Southwest Florida Water Management District; E. Thom Rumberger and Noah D. Valenstein of Rumberger, Kirk and Caldwell, Tallahassee, Florida, on behalf of National Audubon Society; David L. Powell, Gary K. Hunter, Jr., and Mohammad O. Jazil of Hopping Green and Sams, Tallahassee, Florida, on behalf of Association of Florida Community Developers, Inc.; Amy Brigham

Boulris and John W. Little, III of Brigham Moore, LLP, Coral Gables, on behalf of Florida Home Builders and National Association of Homebuilders, Keith C. Hetrick, General Counsel, Tallahassee, Florida, on behalf of Florida Homebuilders Association; and Steven Geoffrey Gieseler and Nicholas M. Gieseler, Stuart, Florida, on behalf of Pacific Legal Foundation,

As Amici Curiae

Appendix B–1

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

JULY TERM 2008

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Case No. 5D06-1116

Appellant,

v.

COY A. KOONTZ, JR., ETC.,

Appellee.

_____/

Opinion filed January 9, 2009

Appeal from the Circuit Court for Orange County, Joseph P. Baker, Judge.

William H. Congdon, Palatka, for Appellant.

Christopher V. Carlyle, Shannon McLin Carlyle and Gilbert S. Goshorn, Jr., of The Carlyle Appellate Law Firm, The Villages, and Michael D. Jones, of Michael D. Jones & Associates, P.A., Winter Springs, for Appellee.

TORPY, J.

St. Johns River Water Management District ["the District"] appeals the trial court's final judgment awarding Coy A. Koontz, Jr., as personal representative of the Estate of Coy A. Koontz, Sr., compensation for the District's temporary taking of Coy A. Koontz, Sr.'s ["Mr. Koontz"] property. This is the fourth time that this case has been appealed to

this Court. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560 (Fla. 5th DCA 1998) ["*Koontz I*"]; *St. Johns River Water Mgmt. Dist. v. Koontz*, 861 So. 2d 1267 (Fla. 5th DCA 2003) ["*Koontz II*"]; *St. Johns River Water Mgmt. Dist. v. Koontz*, 908 So. 2d 518 (Fla. 5th DCA 2005) ["*Koontz III*"]. We affirm.

This case involves a landowner, Mr. Koontz, who, in 1994, requested permits from the District so that he could develop a greater portion of his commercial property than was authorized by existing regulation. The District replied that it would approve the permits only if Mr. Koontz agreed to satisfy certain conditions, one of which was the performance of "off-site" mitigation involving property a considerable distance from Mr. Koontz's property. Mr. Koontz contended that the conditions were unreasonable and rejected the offer. The District then denied the permits. Based on the permit denial, Mr. Koontz brought an inverse condemnation claim asserting an improper "exaction" by the District.[1]

In the most general sense, an "exaction" is a condition sought by a governmental entity in exchange for its authorization to allow some use of land that the government has otherwise restricted.[2] Even though

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[1] Mr. Koontz also asserted other theories that are not relevant to our disposition of this appeal.

[2] The "exactions" theory has roots in "the well-settled doctrine of 'unconstitutional conditions,'" which sets constitutional limits on the manner by which the government bargains away its discretionary authority. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). The application of the doctrine to land-use situations evolved in the state courts over many years and was finally

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the government may have the authority to deny a proposed use outright, under the exactions theory of takings jurisprudence, it may not attach arbitrary conditions to issuance of a permit. *See Dolan v. City of Tigard*, 512 U.S. 374, 397 (1994) (Stevens, J., dissenting) (acknowledging correctness in majority's conclusion that arbitrary conditions may not be imposed even when government has authority to deny permit).

In relating the circumstances giving rise to this case, the trial court explained:

> The subject property is located south of State Road 50, immediately east of the eastern extension of the East-West Expressway in Orange County. The original plaintiff, Coy Koontz, has owned the subject property since 1972. In 1987, a portion of the original acreage adjacent to Highway 50 was condemned, leaving Mr. Koontz with 14.2 acres. There is a 100-foot wide transmission line easement of Florida Power Corporation running parallel to and about 300 feet south of Highway 50, that is kept cleared and mowed by Florida Power. A 60-foot wide drainage ditch runs north and south on the west boundary of the property.

The portion of the site that is proposed for development has been seriously degraded from its condition in 1972, by all of the activity around it.

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[2] (...continued)
approved by the Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 839 (1987), and *Dolan*, 512 U.S. at 389.

There has been intense development in the vicinity, both residential and commercial, and road construction and other governmental projects. The site's usefulness as an animal habitat has been severely reduced.

All but approximately 1.4 acres of the tract lies within a Riparian Habitat Protection Zone (RHPZ) of the Econlockhatchee River Hydrological Basin and is subject to jurisdiction of the St. Johns River Water Management District.

In 1994, Koontz sought approval from the District for a 3.7 acre development area adjacent to Highway 50, of which 3.4 acres were wetlands and .3 acres were uplands.

In his concurring opinion in *Koontz II*, Judge Pleus explained the positions taken by the parties during the permit approval process:

> Koontz proposed to develop 3.7 acres closest to Highway 50, back to and including the power line easement. In order to develop his property, he sought a management and storage of surface waters permit to dredge three and one quarter acres of wetlands. A staffer from St. Johns agreed to recommend approval if Koontz would deed the remaining portion of his property into a conservation area and perform offsite mitigation by either replacing culverts four and one-half miles southeast of his property or plug certain drainage canals on other property some seven miles away. Alternatively, St. Johns demanded that Koontz reduce his development to one acre and turn the remaining 14 acres into a deed-restricted

> conservation area. Koontz agreed to deed his excess property into conservation status but refused St. Johns' demands for offsite mitigation or reduction of his development from three and seven-tenths acres to one acre. Consequently, St. Johns denied his permit applications.

Id. at 1269 (Pleus, J., concurring specially). In its orders denying the permits, the District said that Mr. Koontz's proposed development would adversely impact Riparian Habitat Protection Zone ["RHPZ"] fish and wildlife, and that the purpose of the mitigation was to offset that impact.

After hearing conflicting evidence, the trial court concluded that the District had effected a taking of Mr. Koontz's property and awarded damages. In reaching this conclusion, the trial court applied the constitutional standards enunciated by the Supreme Court in *Nollan* and *Dolan*. In *Nollan*, with respect to discretionary decisions to issue permits, the Supreme Court held that the government could impose a condition on the issuance of the permit without effecting a taking requiring just compensation if the condition "serves the same governmental purpose as the developmental ban." 483 U.S. at 837. This test is referred to as the "essential nexus" test. In *Dolan*, the Court added the requirement that, for such a condition to be constitutional, there must also be a "rough proportionality" between the condition and the impact of the proposed development. 512 U.S. at 390-91.

Here, the trial court determined that the off-site mitigation imposed by the District had no essential nexus to the development restrictions already in place on the Koontz property and was not roughly

proportional to the relief requested by Mr. Koontz. The District makes no challenge to the evidentiary foundation for these factual findings. Instead, it advances arguments directed to the trial court's jurisdiction and the legal viability of Mr. Koontz's claim. The District argues that the lower court never had subject matter jurisdiction to hear Mr. Koontz's claim because section 373.617(2), Florida Statutes, the statute under which Mr. Koontz maintained his claim, expressly limits the scope of circuit court review to cases in which a constitutional taking is proven. It argues that Mr. Koontz's claim is really a challenge to the merits of the permit denial, which it contends may only be pursued in an administrative proceeding. Although the District acknowledges that an exaction claim is a form of takings claim, and is thus cognizable under the statute, it argues that no such exaction occurred here because nothing was exacted from Mr. Koontz. This argument, although couched in terms of jurisdiction, really addresses itself to whether an exaction claim is cognizable when, as here, the land owner refuses to agree to an improper request from the government resulting in the denial of the permit. This is a question that has evoked considerable debate among academics and is the primary point of the dissent.[3]

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[3] The debate is sparked in part by Justice Scalia's dissent in *Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000). Justice Scalia was dissenting to the Court's decision to deny certiorari. He speculated that the lower court could have based its decision on three theories. He dismissed the first two theories outright as implausible, but acknowledged that the third theory was "at least plausible." Speaking of a takings claim predicated on a rejected exaction, he said:

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[3] (...continued)

> When there is uncontested evidence of a demand for money or other property and still assuming that denial of a permit because of failure to meet such a demand constitutes a taking - it should be up to the permitting authority to establish either (1) that the demand met the requirements of *Nollan* and *Dolan*, or (2) that denial would have ensued even if the demand had been met. . . .
>
> [T]he court's refusal to apply *Nollan* and *Dolan* might rest upon the distinction that it drew between the grant of a permit subject to an unlawful condition and the denial of a permit when an unlawful condition is not met. . . . From one standpoint, of course, such a distinction makes no sense. The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process "'an out-and-out plan of extortion,'" *Nollan*, 483 U.S., at 837, 107 S.Ct. 3141 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference. It is undeniable, on the other hand, that the subject of any supposed taking in the present case is far from clear. Whereas in *Nollan*, there was arguably a completed taking of an easement (the homeowner had completed construction that had been conditioned upon conveyance of the easement), and in *Dolan* there was at least a threatened taking of an easement (if the landowner had gone ahead with her contemplated expansion plans the easement would have attached), in the present case there is neither a taking nor a threatened taking of any money. If petitioners go ahead with the conversion of their apartments, the city will not sue for $600,000 imposed as a condition of the conversion; it will sue to enjoin and punish a conversion that has been prohibited.

Lambert, 529 U.S. at 1047-48 (Scalia, J., dissenting). We view Justice Scalia's comments as an acknowledgment that the

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Despite the ongoing debate, we conclude that this question has already been answered in *Dolan* itself, which also involved a challenge to rejected conditions. Although the *Dolan* majority did not expressly address the issue, the precise argument was addressed by the dissent and, thus, implicitly rejected by the majority. *Dolan,* 512 U.S. at 408 (Stevens, J., dissenting). The argument was also directly addressed and rejected in *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), a case upon which the Supreme Court relied in deciding *Nollan. See Goss v. City of Little Rock*, 90 F.3d 306, 309-10 (8th Cir. 1996) (*Dolan* applicable when owner alleges he refused permit predicated upon unlawful condition; case remanded for further proceedings); *Town of Flower Mound v. Stafford Estates Ltd. P'ship,* 135 S.W.3d 620, 625 (Tex. 2004) ("any requirement that a developer provide[s] or do[es] something as a condition to receiving municipal approval is an exaction."); *Salt Lake County v. Bd. of Educ. of Granite Sch. Dist.*, 808 P.2d 1056, 1058 (Utah 1991) (exactions include land dedications or payment of fees as condition for issuance of permit).[4]

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[3] (...continued)
distinction made by the District today is one that is fairly raised, but one without any logical significance.

[4] The policies underpinning exactions claims clearly support this conclusion. As Justice Scalia observed: "The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process 'an out-and-out plan of extortion.'" *Lambert*, 529 U.S. at 1048 (Scalia, J., dissenting) (internal citations omitted). An attempt by government to extort is no less reprehensible than *a fait accompli*. *Nollan* and *Dolan* are also grounded in a skepticism that there exists a correlation
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The District also contends that an action does not lie here because the condition it imposed did not involve a physical dedication of land but instead a requirement that Mr. Koontz expend money to improve land belonging to the District. Again, we conclude that the Supreme Court has already implicitly decided this issue. In *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994), the city conditioned a permit on the payment of money to build tennis courts and purchase artwork. Although the state appellate court upheld the

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[4] (...continued)
between the imposition of improper exactions and over regulation of property. *See Nollan*, 483 U.S. at 837 n.5 ("a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes."). Even an attempt to exact improper concessions supports an inference that the affected property owner's land is over regulated.

Certainly, as the dissent suggests, Mr. Koontz could have completed the off-site work and sued for the cost, which, in hindsight, would have mitigated the amount of assessed damages. However, this does not justify a rule of law that forces an aggrieved property owner to accede to unconstitutional conditions to preserve his right to challenge the abusive practice. Furthermore, such a rule would be completely unworkable when applied to a case where the improper exaction involves a condition that materially alters the design, density or economic feasibility of the project.

The dissent justifies its conclusion by its unexplained prognosis that: "No agency in its right mind will wade into this swamp." Although this might support an argument that *Nollan* and *Dolan* were wrongly decided, it offers no support for the dissent's conclusion that some *Nollan/Dolan* claims may proceed while others may not, depending on how the property owner reacts to the offer. If the dissent is right, it is not because a contrary ruling will rein havoc on the ability of governments to do business.

imposition of the conditions, the Supreme Court vacated the decision and remanded the case to the state court to reexamine it in light of *Dolan*. Absent a more definitive pronouncement from our high court on this issue, we conclude that the distinction advanced by the District is not legally significant. *See* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 637 (2004) (suggesting that Supreme Court "may have settled this issue in favor of extending *Nollan* and *Dolan* to non-possessory exactions" when it remanded *Ehrlich)*; *see also Town of Flower Mound*, 135 S.W.3d 620; *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172 (Wash. Ct. App. 2000).[5]

We have carefully reviewed the District's remaining arguments but dismiss them without further discussion.

AFFIRMED.

ORFINGER, J., concurs, with opinion.

GRIFFIN, J., dissents, with opinion

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[5] We have not overlooked the observation by the dissent that the trial court did not address the legality of the alternative offer to permit a one-acre development, a point not raised by the District. Even if this issue is properly before us, we think the court implicitly rejected this contention. In other words, the trial court decided as fact that the conservation easement offered by Mr. Koontz was enough and that any more would exceed the rough proportionality threshold, whether in the form of off-site mitigation or a greater easement dedication for conservation.

ORFINGER, J., concurring with opinion

CASE No. 5D06-1116

I concur with the Court's opinion. I write separately to comment on several unsettled issues in the jurisprudence of exactions and takings.

What Is An Exaction?

Though *Nollan*[1] and *Dolan*[2] established a two-part test to determine the constitutionality of an exaction demanded by the government as a condition for development approval, the threshold question of what constitutes an exaction, thereby triggering the *Nollan/Dolan* analysis is far from settled. *See generally* Jane C. Needleman, *Exactions: Exploring Exactly When Nollan and Dolan Should be Triggered*, 8 Cardozo L. Rev. 1563 (2006). Neither courts nor academics subscribe to a single definition. For example, one academic defines an exaction as a requirement that a landowner give up a constitutionally-protected right in exchange for some benefit from the government. Stewart E. Sterk, *What Counts as an Exaction?*, 19 No. 4 N.Y. Real Est. L. Rep. 1, 3 (Feb. 2005). Another expanded on this definition, concluding that exactions are "the concessions local governments require of property owners as conditions for the issuance of the entitlements that enable the intensified use of real property." Mark Fenster, *Takings Formalism & Regulatory Formulas: Exactions & the Consequences of Clarity*, 92 Cal. L. Rev. 609, 611 (2004). The Texas Supreme Court embraced a similar broad definition, recognizing that "any requirement

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[1] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

[2] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

that a developer provide[s] or do[es] something as a condition to receiving municipal approval is an exaction." *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 625 (Tex. 2004). Likewise, the Utah Supreme Court in *Salt Lake County v. Board of Education of Granite School District*, 808 P.2d 1056, 1058 (Utah 1991), explained:

> [D]evelopment exactions may be defined as contributions to a governmental entity imposed as a condition precedent to approving the developer's project. Usually, exactions are imposed prior to the issuance of a building permit or zoning/subdivision approval . . . [and] may take the form of: (1) mandatory dedications of land for roads, schools or parks, as a condition to plat approval, (3) water or sewage connection fees, and (4) impact fees.

(Quotations and citations omitted). Finally, in *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 702 (1999), the United States Supreme Court concluded that exactions are "land-use decisions conditioning approval of development on the dedication of property to public use."

Regardless of how one chooses to define an "exaction," the first step in a *Nollan / Dolan* analysis is to determine whether the required "exaction," be it a dedication, fee or improvement, if separated from the development prohibition, would constitute a taking. If it would constitute a taking separate from the development prohibition, only then do I believe that the *Nollan/Dolan* standards become relevant. *See Sterk*, *supra* at 3.

Can There Be A Taking When the Landowner Says No?

The dissent argues that Mr. Koontz has no right to compensation, as no taking occurred, given his refusal to surrender to the government's demands. This argument is premised on the notion that after the government turned down his application, Mr. Koontz had the same development rights that he had before he began the permitting process. He lost nothing, as nothing had changed. Given the divergent views of what constitutes an exaction, that argument has logical appeal, and was the specific argument made in the dissent by Justice Stevens in *Dolan*. *See Dolan*, 512 U.S. at 408 (Stevens, J., dissenting). Had the *Dolan* majority not rejected this precise argument, I would agree with the dissent on this point as it is doctrinally and logically supportable.

Should the Doctrine of Unconstitutional Conditions be Applied to Takings Jurisprudence?

The "exactions" theory of takings jurisprudence has its roots in "the well-settled doctrine of 'unconstitutional conditions,'" which sets limits on the manner by which the government exercises its discretionary authority. *Dolan*, 512 U.S. at 385. However, while the doctrine of unconstitutional conditions may be "well-settled," it is certainly not well understood. *See generally* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U.L. Rev. 593 (1990); Richard A. Epstein, *Unconstitutional Conditions, State Power and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988).

In general terms, the "doctrine of unconstitutional conditions" holds that the government ordinarily may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government has the discretion to withhold the benefit altogether. 16A Am. Jur. 2d Constitutional Law § 395 (2008). But applying that premise in the real world is extremely problematic. One who labors in this field might reasonably ask: When may the government properly ask a citizen to waive a constitutional right in order to obtain a benefit the government has no obligation to provide? The answer suggested by the doctrine of unconstitutional conditions "is that sometimes the government may condition discretionary benefits on the waiver of rights, and sometimes it may not." *See* Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 Denv. U. L. Rev. 859, 859 (1995). That uncertainty and unpredictability in the law benefits no one.

As the instant case demonstrates, when the government has the absolute discretion to grant or deny a privilege or benefit, it still may incur significant liability if, at the conclusion of the land use/development decision, it is found to have improperly pressured or coerced the landowner to give up or waive a constitutional right. And even more troubling, the potential for governmental liability may be just as likely if the government simply reaches a bit too far in the bargaining process. By way of example, no one can doubt that it would be improper to condition receipt of government approval for a development on the agreement of the developer to vote for a certain candidate in an upcoming election. In that circumstance, we would easily find such a condition to be unconstitutional. However, a more likely scenario

is one in which the government asks the landowner for the dedication of twenty acres of wetlands for conservation purposes. Then, after the fact, a court concludes that only a ten-acre dedication was "roughly proportional" to the impact of the proposed development. The consequence of the government asking for a bit too much (but far short of extortion) is governmental liability for damages premised on the exactions theory.

Given the imprecision inherent in the application of the doctrine of unconstitutional conditions, and assuming that governmental entities are generally risk averse, the response from the government to a request by a landowner for a discretionary benefit will likely be a resounding "no." That is unfortunate because at their best, "exactions reflect a sincere government effort to require developers to pay for the costs development places on the surrounding community." Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 513 (1995).[3]

Because the burden to justify a requested exaction is on the government, liability can be avoided if the government simply refuses to engage in the bargaining process with a landowner. Or, a more likely outcome is that the government will refuse to offer any conditions in exchange for development approval, but will consider offers from the landowner. It is hard to imagine that a landowner could invoke the doctrine of

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[3] As Professor Cordes correctly points out, at their worst, the system of exactions has been a means by which governments can use their monopoly power to extort from developers property interests often unrelated to the proposed development. *Cordes, supra* at 513-14.

unconstitutional conditions and claim a taking if the landowner, and not the government, initiates the bargaining process and makes all of the offers. This role reversal accomplishes little, but seems a possible outcome given the uncertainty inherent when applying the doctrine of unconstitutional conditions to land use/development decisions rather than more traditional takings jurisprudence.

There is no doubt that the government should act reasonably in its negotiations with landowners during the permitting process. However, given the imprecision inherent in the "essential nexus" and "rough proportionality" tests mandated by *Nollan* and *Dolan*, the government risks significant liability if, after the fact, it is found to have asked for too much. Overreacting is an inherent risk in the bargaining process. But should every misstep by the government, however reasonable, equate to a taking and create liability? In Fourth Amendment jurisprudence, the United States Supreme Court held that "what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable." *Illinois v. Rodriguez*, 497 U.S. 177 (1990). I think *Nollan* and *Dolan* should likewise be read to require governments to act reasonably in its permitting and land use decisions, while recognizing that such decisions may not always be correct. Perhaps the Supreme Court intended the "rough proportionality" test to encompass such a "wrong but reasonable" standard, but that is far from clear.

GRIFFIN, J., dissenting. 5D06-1116

The majority speaks as if this case is no more than the unremarkable application of settled "exaction" law from the United States Supreme Court. I disagree. There is very little of the law important to this case that is settled law, and if the outcome in this case is dictated by the law of exaction, then somebody needs to get it fixed.

In basic terms, this is what happened:

Mr. Koontz had a mostly wetland fourteen-acre piece of undeveloped land on which he wanted to put a commercial development. For this, he needed a permit from the St. Johns River Water Management District ["the District"]. He concedes he had no right to the permit, and he acknowledges that the government had the right to turn him down flat but, following the time-honored legal principle that "there is no harm in asking,"[1] he submitted an application. This turned out to be a lucrative move, which, in light of this Court's decision, will no doubt be widely emulated all over the State of Florida. Elizabeth Johnson, a scientist employed by the District, told Mr. Koontz that the District would be willing to partly grant his request and allow either the development of one acre, preservation of the balance and no off-site mitigation or development of 3.7 acres, preservation of the balance and some off-site mitigation to enhance fifty acres of

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[1] Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1055 (1936).

existing wetlands a few miles away by cleaning some culverts and ditches.[2] Mr. Koontz apparently thought this latter proposal was OK, except for the part about the culverts and ditches, and so he refused. In the absence of agreement, the permit was denied.

In 1994, Mr. Koontz filed an inverse condemnation lawsuit, claiming that, by imposing an unreasonable condition on the issuance of a permit – the off-site mitigation – the District had taken his property.

Mr. Koontz stipulated that he was not "proceeding upon a theory that the two District final orders deprived [him] of all or substantially all economically beneficial or productive use of the subject property." Rather, in describing the issue to be litigated, he stated:

> The issue before this Court is whether the conditions imposed by the District on the Koontz property and in particular, the required mitigation, resulted in a regulatory taking of Koontz property. The off-site mitigation did not serve a substantial purpose.

This theory was principally based on *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). However, during the twelve years this suit proceeded below, Mr. Koontz'

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[2] Elizabeth Johnson was the supervising regulatory scientist for the District that reviewed the original permit application in 1994 and performed an onsite assessment. She testified that the amount of mitigation required, based on "the quality of the habitat and the species that would likely utilize that type of habitat," was a preservation mitigation ratio that was well within the mitigation formula in use by the District at that time.

original theory of liability evaporated. In 2005, the United States Supreme Court issued its decision in *Lingle v. Chevron*, 544 U.S. 528, 532 (2005), which significantly revised and restated federal "takings" jurisprudence.

In its order determining liability, the trial court explained that it did not appear to the court that Mr. Koontz had a "taking" claim, but that it felt bound to find one by virtue of this Court's 1998 opinion in *Koontz I* that a legally sufficient "taking" claim had been pled that was ripe for determination on the merits.[3] The trial judge ultimately settled on the

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[3] The trial court said:

> Although the St. Johns District has argued otherwise, this court reads that language and the DCA opinion as mandating a trial on the issue of whether there has been a taking. The opinion does not make it clear precisely what legal theory of "taking" the DCA had in mind in its remand. The phrase "all that he could do and still retain an economic use of his property" is read by the District's attorney as saying the DCA perceived the issue on taking as whether the St. Johns District's conditions denied Mr. Koontz all or substantially all of the economically viable uses of his property. If so, one must wonder why the case was reversed and remanded. In that reading there is no issue to be tried since Mr. Koontz does not contend he has lost all or substantially all economically viable use of his property by reason of the conditions he has challenged.
>
> The DCA opinion must be read in its entirety, and the footnotes are important parts of the opinion. In trying to follow the mandate this court has read the opinion many times and listened to and read lengthy arguments about it. To accept the interpretation of the opinion by Mr. Koontz' counsel seems the more prudent choice. Therefore, the case was tried on whether the off-site mitigation required by the

(continued...)

Nollan / Dolan "exaction theory." He found as a matter of fact that the off-site mitigation condition met neither the *Nollan / Dolan* "nexus" or "rough proportionality" requirements and that, accordingly, the District had "taken" Mr. Koontz' property. Mr. Koontz was awarded, as compensation for this "taking," the sum of $376,154.00. This was calculated to be the rental value of the property based on a valuation *with* the permit of $477,000. The rental term was calculated to be from 1999, when the permit was denied, until the permit was issued in 2005.[4]

On appeal, the District does not contest the trial court's determination that the off-site mitigation condition was an "exaction" under *Nollan / Dolan*, but the District does contend that there was no "taking." I agree and would reverse this judgment.

It is clear after *Nollan* that the notion of "unconstitutional conditions" imposed by a government on the grant of a discretionary benefit, such as a permit, can cause a taking of property. *Nollan*, and later, *Dolan*, were occupied, however, with the problem of defining what sorts of conditions on the use or development of real property rose to the level of "unconstitutional." The legal *effect* of a judicial

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[3] (...continued)
District was an unreasonable exercise of police power. The DCA opinion is consistent with reading the *Nollan* and *Dolan* cases as providing constitutional tests applicable to the Koontz property.

[4] The District urged that Mr. Koontz had suffered no damage at all because his property had more than tripled in value during the eleven years.

determination that an agency has imposed an unconstitutional condition, which the Court dubbed an "exaction" is barely and only inferentially dealt with. *Dolan* was remanded to the state court to make an individualized determination whether the land dedication condition was related both in nature and extent to the impact of the proposed development. 512 U.S. at 391. There are multiple basic questions about "exaction" law that have not yet been answered by the United States Supreme Court, and the limited number of cases decided by lower courts in light of *Nollan* and *Dolan* are not very helpful. In my opinion, the majority has chosen the wrong answers to several basic questions about "exactions."

The first and most basic question posed by this case is whether the imposition of an unconstitutional condition on an agency's issuance of a land use permit is necessarily a "taking" of the real property. There is little doubt after *Nollan* and *Dolan* that an unconstitutional condition that requires a landowner to give up any of its bundle of rights in the land is a "taking." That was the kind of condition that was at issue in those two cases, and a fair reading of the various opinions in *Nollan* and *Dolan* suggests that all the Court had in mind was the agency's acquisition of an interest in real property. In two later cases, *Lingle* and *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702-03 (1999), the Supreme Court indicated that application of *Nollan* and *Dolan* was limited to cases involving the dedication of private property as a condition of permit approval. *See Lingle*, 544 U.S. at 547 (noting that *Nollan* and *Dolan* not extended beyond special context of exactions requiring dedication of private property as condition of permit

approval); *City of Monterey*, 526 U.S. at 702-03 ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use."). Legal scholars who have focused on these cases agree that the issue is up in the air. *See, e.g.*, Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 635-42 (2004); Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 Hastings L.J. 729 (2007).

Given the Court's description of an "unconstitutional condition," and the cases it relied upon in *Nollan* and *Dolan* as the source of this law, I do not see any principled way to distinguish an unconstitutional condition that requires a permit applicant to give up an interest in land from one that requires the permit applicant to give up anything else that belongs to him. If the condition does not meet the "nexus" and "rough proportionality" tests of *Nollan/Dolan*, it is invalid. As *Nollan* and *Dolan* make clear, such an "exaction" may constitute a "taking"; it is not, however, necessarily a "taking." Whether a "taking" has occurred ought to depend – and I suggest – does depend on whether any protected interest in land is actually given up. If it is, whether temporarily or permanently, the landowner is entitled to compensation as set forth in the "taking" cases. If, however, the unconstitutional condition does not involve the taking of an interest in land, the remedy of inverse condemnation is not available. In this case, the objected-to condition that was found to be an exaction was not an interest in land; it was the

requirement to perform certain off-site mitigation in the form of clean-up of culverts and ditches to enhance wetlands several miles away.

This does not mean that Mr. Koontz was without a remedy for this transgression on the part of the District. He no doubt has several. Most obviously, he could do as was done in the *Nollan/Dolan* cases, as well as most other subsequently reported cases, and challenge the permit denial or condition as invalid. Mr. Koontz did not have an absolute right to a permit, but he did have an enforceable right to consideration of his permit application, burdened only with constitutional conditions. If he had acquiesced in the District's unconstitutional demands, he should have had the right to recover whatever "exaction" he had paid or performed. He was not entitled, however, to a judgment in inverse condemnation for the temporary taking of his land. The right to compensation for the temporary or permanent taking of property under Florida law requires that substantially all beneficial value in the land actually be taken. In this case, *nothing* was ever taken.

The law of "unconstitutional conditions," which mainly grew out of the government's attempt to impose conditions on public employment limiting freedom of speech, such as loyalty oaths, is poorly developed in the cases and rarely applied. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Bd. of Edu.*, 391 U.S. 563 (1968). Facile as it may seem to say, getting or keeping a government job and being compensated for the taking of private property are two very different things. In the employment cases, the employee either already had a job, or would have had the job, but for the unconstitutional condition. In those cases, the

litigation simply invalidated the condition. To say that an agency's imposition of a condition on the discretionary grant of a permit to develop real property necessarily "takes" the property until the condition is removed is illogical. If an agency imposes an unconstitutional condition on public employment that deprives a person of his right of free association or free speech, the invalidation of the condition does not require that the government employ, or continue in employment, anyone who was burdened by the condition. The unconstitutional condition is simply removed and the individual may or may not be hired or continued in employment based on constitutional criteria. By imposing an unconstitutional condition, the agency did not "take" the job. In this case, when the District imposed an unconstitutional condition on the application for permit approval, the District did not take the land, and Mr. Koontz was not entitled to be compensated as if it had been taken. Clearly, though, if what was exacted from Mr. Koontz was money or services, not real property, under the reasoning of *Nollan/Dolan,* he could recover it.

For example, in *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004), the Texas Supreme Court considered a case where a developer was required to rebuild a road as a condition to development. The court found that the Town had extracted a benefit to which the Town was not entitled and approved as the measure of damages the cost of the exaction, less the cost of improvements that the developer should have had to pay anyway and special benefits to the development. 135 S.W.3d at 627. It makes no sense that the damages for an exaction that is acceded to is the cost of the exaction,

but an exaction not acceded to gives rise to a "taking" of the property.

Another important issue that the United States Supreme Court has also yet to directly address is the issue of whether *Nollan* and *Dolan* can apply in a circumstance where the landowner has rejected the condition, and, therefore, nothing has been exacted. *See Fenster,* 92 Cal. L. Rev. at 639. In *Lambert v. City & County of San Francisco,* 67 Cal. Rptr. 2d 562, 659 (Cal. Ct. App. 1997), *cert. denied,* 529 U.S. 1045 (2000), the court concluded that because the condition was rejected "neither a property right nor money was in fact taken . . . there is [therefore] nothing requiring review under the *Nollan/Dolan/Ehrlich* standard." When the United States Supreme Court denied certiorari review of this decision, Justice Scalia wrote a dissent briefly discussing this issue, calling it "plausible":

> It is undeniable, on the other hand, that the subject of any supposed taking in the present case is far from clear. Whereas in *Nollan* there was arguably a completed taking of an easement (the homeowner had completed construction that had been conditioned upon conveyance of the easement), and in *Dolan* there was at least a threatened taking of an easement (if the landowner *had* gone ahead with her contemplated expansion plans the easement would have attached), in the present case there is neither a taking nor a threatened taking of any money. If petitioners go ahead with the conversion of their apartments, the city will not sue for $600,000 imposed as a condition of the

> conversion; it will sue to enjoin and punish a conversion that has been prohibited.

Lambert, 529 U.S. at 1048 (Scalia, J. dissenting).

The majority's only response to this point is that the issue was already settled in *Dolan* because, when it was raised in Justice Stevens' dissent, the majority ignored the issue. I suggest it was not addressed in the *Dolan* majority opinion, not because it was so lacking in substance that it did not merit any ink, but because at that procedural juncture in *Dolan*, it simply was not relevant. *Dolan* came to the Court through Oregon's administrative appeal process. Mrs. Dolan sought review of the decision of the Land Use Board of Appeals that a requirement of dedication of a portion of her property for drainage and a bike path were valid conditions to attach to approval of her application for a permit to enlarge her store. The fact that she had not made the dedication was no impediment to her right to appeal the decision. If, after exhaustion of her appeals, the condition were found to be valid, or "constitutional," she could then decide to accept or decline. All the Court did in *Dolan* was announce the second prong of the "exactions" test and send it back to see whether she ought to prevail in her appeal.

If we are going to be deciding this issue based on what was *not* said in an opinion, surely the fact that Justice Scalia never mentioned in his *Lambert* dissent that this issue already had been decided in *Dolan* is significant. For my money, given Justice Scalia's proclivities in this area of the law, for him to refer to the absence of a "taking" as a "plausible" defense to a "takings" claim is a pretty big deal. Besides, in what parallel legal universe or deep chamber of Wonderland's rabbit hole could there be a right to just

compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none ever given up by the owner?

The position that a regulatory taking can occur under a land-use exaction theory in circumstances where the permit is denied and no property interest is actually conveyed may have made some sense in the pre-*Lingle* world; however, now that *Lingle* has clarified the proper focus of regulatory takings analysis, the position that a "taking" has occurred solely because the State made an offer that was rejected is untenable. It is not the *making* of an offer to which unconditional conditions are attached in violation of the limitations of *Nollan / Dolan* that gives rise to a taking; it is the receipt of some tangible benefit under such coercive circumstances that gives rise to the taking. *See Lingle*, 544 U.S. at 539-40.

Faced with the unconstitutional condition offered by the District in this case, Mr. Koontz had several options that he could have pursued. If he performed the mitigation, he could have sought recovery for it,[5] or he could have gotten a judicial determination that the condition was invalid by administratively appealing the District's decision. Just as with an ordinary inverse condemnation case, if the State demands an interest in land for which it offers no compensation, there is only a "taking" if the interest is actually taken. It is not the demand that is compensable, only the taking. If a landowner decides not to accede, his remedy is to contest the government action. Here, Mr.

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[5] *See Town of Flower Mound*, 135 S.W. 3d at 630.

Koontz elected not to contest the validity of the permit denial decision on any basis other than a "taking."[6]

Nollan and *Dolan* are exactly the same. In explaining the concept of an exaction-type of "taking" in *Dolan*, the Court said that requiring the landowner to dedicate two strips of her property as a condition of approval might be a taking of the dedicated land. There is no suggestion that it was a taking of the entire 1.67 acre parcel. What is "taken" in these cases is what was improperly exacted. In this case, if Mr. Koontz had given in to the District's condition, gotten his development permit and done the off-site mitigation, he would be entitled to recover the value of the off-site mitigation. If he elected to refuse the offer, he had a judicial remedy to invalidate the condition, just as Mrs. Dolan did. The parcel of land for which he sought the development permit was not, however, in any wise "taken" by the District. The only way a "taking" can even be conceptualized in such a circumstance is by adopting the view that by proposing an "unconstitutional condition" that was rejected, the District forfeited its right (and duty) to protect the public interest to refuse the permit at all.

To suggest that the agency might forfeit its right to refuse or require constitutional conditions for issuance of a permit because the agency guessed incorrectly where the boundaries of "nexus" or "rough proportionality" lay has no basis in logic or in any law that I can find. Nor is it fair or practical. As challenging as this case has been to apply *Nollan/Dolan* exaction law, I am at least grateful that this case does not involve a nexus/rough

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[6] *See* § 373.617(2), Fla. Stat. (1993).

proportionality analysis. Reading cases from other jurisdictions where courts have had to struggle with these twin issues shows that this analysis can be extremely complex, but in the final analysis, it is completely arbitrary. *See Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n*, 163 Cal. App. 4th 215 (Cal. App. 2008); *B.A.M. Dev. L.L.C. v. Salt Lake County*, 196 P.3d 601 (Utah 2008). The twin issues of "nexus" and "rough proportionality" might be apparent in some cases at the margins, but in most of these cases, they come down to a judge's subjective opinion about connection and equivalency. No agency in its right mind will wade into this swamp. It will be too risky for a governmental agency to make offers for conditional permit approvals or to offer a trade of benefits out of fear that the offer might be rejected and the condition later found to have lacked adequate nexus or proportionality. Better to deny the permit and defend the decision under the traditional law of regulatory "takings."

I recognize that one judge looking at the facts of this case might see reasonable conduct on the part of the District to allow a landowner some flexibility to develop his land, even if it involves wetland destruction, by securing a benefit for the public's interest in improving wetlands within the same geographic basin, while another judge will see "gimmickry"[7] designed to steal from Mr. Koontz. Surely, even the most extreme view that conditions imposed on the issuance of a permit constitute an "out and out plan of extortion" would, nevertheless, recognize that removal of the unconstitutional condition cannot mean the applicant acquires the right

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[7] *Dolan*, 512 U.S. at 389.

to be free of *any* condition. Such a judicially-invented notion might not do much harm on fourteen acres in the middle of rural central Florida but in a thousand other contexts, it could be disastrous.

In *Nollan*, the Court held that the government could impose a condition on the discretionary decision to issue a permit without effecting a taking requiring just compensation if "the permit condition serves the same governmental purpose as the developmental ban." *Nollan*, 483 U.S. at 837. Mr. Koontz had the right to a constitutional condition – no more, no less.

Finally, land-use exaction theory only appears to apply in circumstances where the property owner is faced with a choice between an exaction and permit denial. In this case, Mr. Koontz was never in that position because he had a third option—modification of his development to one acre with no "exaction." The trial court never found that the proffer of this option by the District was any form of a "taking."

In summary, correct application of exactions law requires the conclusion in this case that, although the off-site mitigation condition for issuance of the permit was invalid, nothing was ever "taken" from Mr. Koontz, in the Fifth Amendment sense of the word, and he has no right to recovery in inverse condemnation.

Appendix C–1

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. C1-94-5673

COY A. KOONTZ, JR., as personal representative of the estate of Coy A. Koontz, deceased,

Plaintiff,

v.

THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, et al.,

Defendants.

Entered: February 21, 2006

FINAL JUDGMENT

THIS CAUSE came on for trial pursuant to directions from the Fifth District Court of Appeals (*St. Johns River Water Management District v. Koontz*, 861 So.2d 1267 [5th DCA 2003]; and *St. Johns River Water Management District v. Koontz*, 908 So.2d 518 [5th DCA 2005]) to determine damages to be paid as just compensation for the temporary taking of Coy Koontz' property as determined by Judge Joseph P. Baker in the Final Judgment of October 30, 2002, and the parties agreeing that the only issue for trial was the determination of the amount of said damages, and the Court having heard argument of counsel and testimony of the witnesses, it is therefore:

ORDERED AND ADJUDGED:

1. The parties have submitted various methodologies for the determination of temporary taking damages. The Court finds that under the facts of this case, the amount of compensation and methodology opined by Steven Matonis, MAI, Appraiser, properly identifies the amount of temporary damages due from the initial taking date of June 9, 1994 through the issuance of the District permit on December 12, 2005. Accordingly, this court enters judgment for the Plaintiff, Coy A. Koontz, finding just compensation due from the Defendant, St. Johns River Water Management District, in the amount of $327,500.00, together with interest calculated yearly at the legal rate and carried forward since 1994, in the amount of $48,654.00 for a total award of damages of $376,154.00, for which let execution issue.

2. The Court reserves jurisdiction to determine the amount of attorney fees and costs due to Plaintiff, Koontz, pursuant to Florida Statutes, Section 373.617.

DONE AND ORDERED, this FEB 21 2006, in Orlando, Orange County, Florida.

LAWRENCE R. KIRKWOOD
CIRCUIT COURT JUDGE
Lawrence Kirkwood
Circuit Court Judge

Copies to:
William H. Congdon, Jr. Esquire
Michael D. Jones, Esquire

Appendix D–1

IN THE CIRCUIT COURT OF
THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

COY A. KOONTZ, JR., as Personal Representative of the estate of Coy A. Koontz, deceased,

Plaintiff,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, ET AL.,

Defendants.
_____/

Case No. C1-94-5673

Entered:
October 30, 2002

FINAL JUDGMENT

This cause coming on for trial before this Court on August 28, 2002, on the Plaintiffs', Coy A. Koontz, Jr., as personal representative of the estate of Coy A. Koontz, deceased, claim that the St. Johns River Water Management District's acts and conduct in denying the permit for the development of his property resulted in a regulatory taking of the property. After review of the file, the memorandums of law, the exhibits and having considered the qualifications and credibility of the witnesses testifying in this cause, it is the judgment of this court that the off-site mitigation conditions imposed upon Koontz by the District resulted in a regulatory taking of the Koontz property.

INTRODUCTION

"When a butterfly flutters its wings in one part of the world, it can eventually cause a hurricane in another." IT was the MIT meteorologist Edward Lorenz who wrote that in his book Chaos Theory. He was repeating an observation that has been repeatedly made over thousands of years to emphasize that the full range of possible consequences of events in our world is uncertain, unknowable and unpredictable. His book offsets the impression that comes from the degrees of predictability achieved in our physical sciences. Among those sciences are environmental sciences. Advanced as they are, Professor Lorenz and others have shown us the need to recognize the limits of even our best sciences. Any butterfly might be blowing up a hurricane. Which one, when and where is not foreseeable.

When the undersigned quoted Professor Lorenz in questioning some of the witnesses, it was to express the spirit of his book. By quoting Professor Lorenz there as no intention to discredit the expert witnesses who opined on environmental impacts. They appeared to accept the same limitation on their ability to know the future.

Some argue that because we can't know the consequences of human activity on "nature", any restraint on development is desirable. It is also argued an the other hand that since the consequences of development are unknowable, no regulation on development can be sound.

Recognizing one's limits on what one can know is realistic. In making a decision it is good sense to consider what one does not know as well as what one

does. The recognition is not paralyzing. IT cannot render the water management districts or other agencies incapable of decisions. It does not render this court incapable of making a decision. It does, however, make this court diffident in its decision.

HISTORY AND STATEMENT OF THIS CASE

The subject property is located south of State Road 50, immediately east of the eastern extension of the East-West Expressway in Orange County. The original plaintiff, Coy Koontz, has owned the subject property since 1972. In 1987, a portion of the original acreage adjacent to Highway 50 was condemned, leaving Mr. Koontz with 14.2 acres. There is a 100-foot wide transmission line easement of Florida Power Corporation running parallel to and about 300 feet south of Highway 50, that is kept cleared and moved by Florida Power. A 60-foot wide drainage ditch runs north and south on the west boundary of the property.

The portion of the site that is proposed for development has been seriously degraded from its condition in 1972, by all of the activity around it. There has been intense development in the vicinity, both residential and commercial, and road construction and other governmental projects. The site's usefulness as an animal habitat has been severely reduced.

All but approximately 1.4 acres of the tract lies within a Riparian Habitat Protection Zone (RHPZ) of the Econlockhatchee River Hydrologic Basin and is subject to jurisdiction of the St. Johns River Water Management District.

In 1994, Koontz sought approval from the District for a 3.7 acre development area adjacent to Highway 50, of which 3.4 acres were wetlands and a .3 acres were uplands. Mr. Koontz agreed to dedicate the remaining approximately 11 acres of his property for preservation. The District found the 11 acres was not sufficient mitigation of the development, and it offered alternative mitigation to Mr. Koontz. One of the conditions it settled upon was that he enhance off-site wetlands. This off-site mitigation has not been precisely prescribed, but in general terms, it was enhancement of 50 off-site acres of wetlands by replacing culverts and plugging some ditches. The off-site mitigation would be either four and a half or seven miles from the Koontz property. The cost of this off-site mitigation was not definite. It could cost between $90,000.00 and $150,000.00, but there is evidence it could cost as little as $10,000.00.

Mr. Koontz refused to accept the off-site mitigation. His application was denied. Mr. Koontz then filed suit in August, 1994. In 1997, Mr. Koontz' claim was dismissed by a predecessor judge in this division. This dismissal was appealed. The dismissal was affirmed on all but one ground. The Fifth District Court of Appeal reversed the dismissal on Mr. Koontz' claim of inverse condemnation. That left one issue, according to the Pretrial Statement, which is,

> whether the conditions imposed by the District on the Koontz property and in particular, the required mitigation, resulted in a regulatory taking of the Koontz property [because] the off-site mitigation did not serve a substantial purpose.

Mr. Koontz is contending, in other words, that the District has taken his property as a result of the District's conditioning the development of his property upon off-site mitigation, which Mr. Koontz contends is an unreasonable exercise of the District's police power.

LEGAL ISSUE

Mr. Koontz' legal argument looks to *Agins v. City of Tiburon*, 447 U.S. 255 (1980). That was an action seeking a declaratory decree that a zoning law restricting development of five-acre lots in San Francisco was a taking. It was held not to be so. *Agins* cites *Euclid v. Ambler Co.*, 272 U.S. 365 (1926) as framing the legal issues. Property owners may bring actions for declaratory decrees from state courts on theories of inverse condemnation. In other words of the *Agins* court, this is what is to be decided in these cases:

> The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.

The *Agins* court upheld the zoning law before it, but announced a rule that it was not necessary for a taking that the property owner be deprived of virtually all economical use of the property. A taking could also occur if the governmental restrictions did not "substantially advance a legitimate state interest."

Mr. Koontz cites several other cases. One of his primary authorities is *Nollan v. California Coastal Commission*, 48 U.S. 825 (1987). In that case, the Nollans applied to the California Coastal Commission

for a permit to build on oceanfront property. This property had a seawall. The seawall was eight feet high. The historic mean high tide line determined the lot's oceanside boundary, which left property belonging to the Nollans beyond the wall, between the seawall and the ocean. The Nollan property was one of several that lay between two public beaches. The California Commission conditioned development by the Nollans on their allowing a public easement across their property between the high tide line and the seawall to make it easier for the public to have access to the two parks.

The Nollans protested the condition as a taking, and the case wound its way to the Supreme Court. The majority opinion of Justice Scalia can be fairly said to focus on the "nexus" between the conditions imposed on development and the proper governmental purpose of building restrictions. His opinion concludes that there was no connection between the legitimate concerns of the State of California in developing coastal properties and providing an easement for public passageway. As he wrote:

> In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "and out-and-out plan of extortion."

Mr. Koontz' case is quite clearly different in nature from the *Nollan* case. Justice Scalia's opinion relies on the legal principle that "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"

> [W]here governmental actions results in "[a] permanent physical occupation" of the property by the government itself or by others . . . "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owners."

Unlike the Nollans' situation, Mr. Koontz is not being asked to give up his right to exclude others in favor of passers by. Neither the government nor anybody else is going to occupy the property of Mr. Koontz.

Dolan v. City of Tigard, 512 U.S. 374 (1994), requires a showing of a legitimate state interest and demonstrating an "essential nexus" between it and the exaction from the property owner's rights. There is the additional requirement imposed on the public agency of showing rough proportionality between the what is being exacted from the owner and the state interest. In Dolan the court found that the dedication of land for a storm drainage system and dedication of a 15-foot strip for a bike and pedestrian path were disproportionate.

Here. again, the *Dolan* case can be distinguished by the nature of the use for the property being dedicated. It would be turning over property from the owner for use by the government or by bicyclists and pedestrians. Neither of those uses were prohibited conditions and exactions in and of themselves. The City of Tigard lost because it failed to show how either or both condition could be roughly proportional to the impact of Dolan replacing an existing plumbing and electrical supply store with a larger one.

The St. Johns Water Management District argues very persuasively that all of this Federal precedent is inapplicable. As noted, the *Nolan* and *Dolan* cases are clearly distinguishable in fact and legal principle. The District also argues differences between the Federal and Florida Constitutions and different application of them in Federal and Florida courts. The District cites *Dept. of Transportation v. Weisenfeld*, 617 So. 2d 1071 (Fla. 5th DCA 1993), *Hillsborough Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54 (Aa. 1994), and *City of Pompano Beach v. Yardarm Restaurant*, 541 So. 2d 1377 (Fla. 4th DCA 1994) in support of its argument that *Agins v City of Tiburon* and the other cases relied upon by Mr. Koontz are not constitutional law in Florida. The District argues its authority decisively demonstrates that Koontz cannot prevail in this suit without proof the District permitting actions deprived him of all or substantially all economically beneficial or productive use of his entire parcel. Admittedly, Mr. Koontz has not proven that all or substantially all economically viable use of his property has been denied by the District.

St. Johns Water Management District also argues that Mr. Koontz was barred from attacking the validity of the District's decisions by Florida Statutes § 373.617 and by the doctrine of election remedies. That statute requires that,

> [Review of government] agency action for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence shall proceed in accordance with Chapter 120.

This same statute confines circuit courts to "determine whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation."

That brings us to the opinion and mandate of the Fifth District Court of Appeal. It reversed dismissal of Mr. Koontz' compliant and remanded for trial. Its directions on the issues to be addressed and resolved should be followed. Mr. Koontz and the St. Johns District do not agree on the interpretation of the DCA opinion.

In Footnote #1 of their opinion the district court judges quote themselves for unanswered questions posed in the case. These questions remain unanswered. The district court in its opinion explaining why the case was reversed and remanded for trial put it this way:

> {Koontz'} position, in effect, was that the application he filed and the concessions he was willing to make to the District in order for it to issue the permits (his giving up over two-thirds of his property to the District) was all that he could do and still retain an economic use of his property. The District turned him down. It made a final decision on the only application before it. . . . There is no requirement that an owner turned down in his effort to develop his property must continue to submit offers until the governing body finally approves one before he can go to court. If the governing body finally turns down an application (sic) and the owner does not desire to make any further concessions in order to possibly obtain the approval, the

> issue is ripe. The owner in this case drew a line in the sand and told the District: "I can go no further." Whether the owner can now convince the court that there has, in fact, been a taking is the issue property before this court.

Although the St. Johns District has argued otherwise, this court reads that language and the DCA opinion as mandating a trial on the issue of whether there has been a taking. The opinion does not make it clear precisely what legal theory of "taking" the DCA had in mind in its remand. The phrase "all that he could do and still retain an economic use of his property" is read by the District's attorney as saying the DCA perceived the issue on taking as whether the St. Johns District's conditions denied Mr. Koontz all or substantially all of the economically viable uses of his property. If so, one must wonder why the case was reversed and remanded. In that reading there is no issue to be tried since Mr. Koontz does not contend he has lost all or substantially all economically viable use of his property by reason of the conditions he has challenged. *See*, Joint Pretrial State ¶ II, 5.

The DCA opinion must be read in its entirety, and the footnotes are important parts of the opinion. In trying to follow the mandate this court has read the opinion many times and listened ta and read lengthy arguments about it. To accept the interpretation of the opinion by Mr. Koontz' counsel seems the more prudent choice. Therefore, the case was tried on whether the off-site mitigation required by the District was an unreasonable exercise of police power. The DCA opinion is consistent with reading the *Nollan* and

Dolan cases as providing constitutional tests applicable to the Koontz property.

CONCLUSION

Viewed in the manner just described, the St. Johns Water Management District did not prove the necessary relationship between the condition of off-site mitigation and the effect of development. There was neither a showing of a nexus between the requited off-site mitigation and the requested development of the tract, nor was there a showing of rough proportionality to the impact of site development. Under this legal approval, the St. Johns District's required conditions of unspecified but substantial off-site mitigation resulted in a regulatory taking.

It is the opinion of this Court that the denial of the Koontz permit application by the St. Johns River Water Management District was invalid and this case shall be remanded to the St. Johns River Water Management District, pursuant to § 373.617, Florida Statutes and the District shall submit a statement of its agreed upon actions with regard to the Koontz permit application to this Court within ninety (90) days hereof. This Court reserves jurisdiction for the entry of orders necessary to facilitate this judgment, as well as the issues of attorney fees and costs.

DONE AND ORDERED this 30 day of October, 2002.

/s/ JUDGE JOSEPH P. BAKER
JOSEPH P. BAKER
Circuit Court Judge

Copies to:
Michael D. Jones, Esquire
William C. Congdon, Esquire

Appendix E–1

IN THE CIRCUIT COURT OF
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CASE NO. C1-94-5673

COY A. KOONTZ, JR., as personal representative of the estate of Coy A. Koontz, deceased,

Plaintiff,

v.

THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, et al.,

Defendants.

JOINT PRE-TRIAL STATEMENT

* * * *

(L). The District staff suggested several design alternatives to Koontz to reduce and offset the adverse impacts to RHPZ fish and wildlife so that the District could permit the proposed project. Specifically, as set forth in the final orders:

(1) The District proposed that Koontz reduce the scale of his commercial development to .07 acres of wetlands and .03 acres of uplands within the RHPZ with mitigation in the form of a conservation easement or deed restriction over the remaining undeveloped wetlands and uplands, minus the .04 acre portion covered by an existing paved road and the .05 acre portion of the right-of-way.

(2) Alternatively, the District proposed that in addition to Koontz's proposed on-site mitigation plan, that Koontz also provide off-site mitigation by restoring and enhancing at least fifty (50) acres of wetlands on a District-owned parcel (Hal Scott Preserve) on the Econlockhatchee River located about four and a half miles southeast of Koontz's parcel. The replacement of nonfunctioning culverts would enhance the wetland functions to wildlife in the Preserve and maintain the hydrologic function of the wetland system. Also, several upland ditches have altered the natural hydroperiod of some isolated wetlands and the plugging of those ditches would rehydrate the affected wetland systems and enhance the wildlife functions of the Econ Basin.

(3) Alternatively, the District also proposed, as off-site mitigation, in addition to Koontz's proposed on-site mitigation, that Koontz could restore and enhance at least fifty (50) acres of wetlands on a District-owned parcel (Demetree parcel) in the Econ Basin located about seven miles northeast of the Koontz property. The plugging or elimination of a series of upland ditches connected to several

wetlands would assist the rehydration of the wetland system and enhance the wetland functions to wildlife in the Basin.

(4) The District would also favorably consider equivalent mitigation enhancement options on other properties within the Basin proposed by Koontz.

* * * *

OPPOSITION BRIEF

No. 11-1447

In the Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

When a development is proposed that would destroy wetlands, Florida—like many states and the federal government—requires mitigation to offset the adverse environmental impact. Here, Petitioner sought permits to develop land composed almost entirely of wetlands and agreed that mitigation was necessary. He made one offer to mitigate, which was determined to be inadequate. He refused to consider government-offered mitigation alternatives, or to make alternative proposals of his own. Thus his permit applications were ultimately denied.

Instead of appealing or seeking administrative review, Petitioner sued and alleged a taking of his real property under the Florida Constitution. After litigating a real property-based claim in the state courts, he now poses a different, exaction of "money and labor"-based claim for review by this Court. His Petition asks:

1. Whether the government can be held liable for a taking when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and

2. Whether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.

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OPINIONS BELOW

The opinion of the Supreme Court of Florida (Pet.App. A-1) is reported at 77 So. 3d 1220 (Fla. 2011), *reh'g denied*, __ So. 3d __ (Jan. 4, 2012). The opinion of Florida's Fifth District Court of Appeal (Pet.App. B-1) is reported at 5 So. 3d 8 (Fla. Dist. Ct. App. 2009). The final judgment and opinion of the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, is unpublished, but reproduced in the Petition Appendix at C-1 and D-1, respectively.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on November 3, 2011. The Florida Supreme Court denied Petitioner's motion for rehearing on January 4, 2012. On March 30, 2012, Justice Thomas granted Petitioners' motion for an extension of time in which to file his petition for certiorari, extending the deadline through June 1, 2012. A timely petition for certiorari was filed on May 30, 2012. Petitioner asserts that this Court has jurisdiction under 28 U.S.C. § 1257(a).

Respondent *disputes* this Court's jurisdiction, which Petitioner bases on having filed "an inverse condemnation lawsuit in the Florida state courts [under] the Fifth and Fourteenth Amendments." Pet. 1. In fact, Petitioner filed only a *state law* takings claim under "Article X, Section 6, of the Florida Constitution" (R375, Am. Compl. ¶48), and he "explicitly reserve[d] the right to assert all federal claims ... for later resolution by a federal court." (R368 ¶18; R375 ¶47 (incorporating paragraph 18)). This Court lacks jurisdiction.

STATEMENT OF THE CASE

Like other states and the federal government, Florida has long protected wetlands, but allowed for their development if a project's adverse impact is either negligible or offset by mitigation. Fla. Stat. § 373.414(1), Fla. Stat. (1993). *See also* Bruce Wiener & David Dagon, *Wetlands Regulation and Mitigation After the Florida Environmental Reorganization Act of 1993*, 8 J. Land Use & Envtl. L. 521, 537–39 (Summer 1993) (describing the 1984 Henderson Act that required permitting for wetland dredge and fill projects and mitigation to reduce adverse impacts). Relatively often, developers will disagree with water management officials about the value of the mitigation needed to offset a proposed project's destruction of wetlands. This is one of those cases. Coy A. Koontz, Sr.[1] and the Respondent St John's River Water Management District (the "District") had a "difference of opinion" (R1672),[2] not that mitigation would be required for his project to go forward, but as to the value of wetlands proposed for

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[1] Petitioner Coy A. Koontz, Jr. is the son and successor in interest to Coy A. Koontz, Sr., who owned the subject property and filed the lawsuit. *See* Pet. 1 n.1.

[2] References to the Record on Appeal are indicated with an "R" followed immediately by the page number. References to the transcript of the liability trial are indicated with a "T" followed by the transcript page number. Unlike the liability trial transcript, the transcript of the hearing before the District's Governing Board (R970-1001) and the transcript of the compensation trial (R1432-1500) were not separately indexed and appear as regular record ("R") cites.

development *versus* the sufficiency of proposed mitigation to offset the destruction of wetlands.

Petitioner claims incorrectly that the District engaged in an "out-and-out plan of extortion" (Pet. 9), just because the District refused Petitioner's one and only mitigation offer that would have offset only a fraction of his project's destruction of wetlands under established state guidelines. Petitioner subsequently did not collaborate with the District to find an agreeable resolution; he would not put forward an alternative mitigation proposal of his own; and he refused various alternative mitigation offers put forward by the District. Then, instead of pursuing resolution of his dispute through established Administrative Procedures Act processes (Pet.App. A-22; R619(M) (Joint Pretrial Statement), he sued.

A. Petitioner's Application For Permits To Dredge, Fill, and Eliminate Wetlands.

In 1994, the Petitioner sought permits for a project that would dredge, fill, and eliminate about 3.4 acres of undeveloped wetlands and 0.3 acres of adjacent protected uplands on his 14.2-acre parcel.[3] Petitioner sought the permits from the Respondent District, which managed state wetlands in his

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[3] Koontz applied for both a management and storage of surface water permit and a wetland resource (or "dredge and fill") permit. (R1501-66, 1579-1612). The Board rendered final orders as to both applications. For simplicity, this brief will refer to the 3.4 acres of wetlands and the 0.3 acres of protected uplands collectively as "wetlands," will use the singular "final order," and will henceforth cite to only the dredge and fill final order.

proposed project zone. Consistent with Florida law and its practice, the District could only approve the permits if the project did not cause a net adverse impact to wetland water resources and functions, or if the adverse impact was offset by mitigation. *See* Fla. Stat. § 373.414(1)(b) (1993).

In this instance, it was undisputed that Petitioner's project would adversely impact wetlands and that mitigation was necessary. Identifying appropriate mitigation is generally a collaborative process between an applicant and the District and mitigation proposals can come from either side. Ultimately, however, it is up to the applicant to choose what mitigation alternative will be followed:

> [T]he governing board ... in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects, [including] onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136. It shall be the responsibility of *the applicant* to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity.

Fla. Stat. § 373.414(1)(b) (1993) (emphasis added). Where impasse is reached about appropriate mitigation, an applicant can challenge the agency's denial of a permit in an administrative forum. Pet.App. A-22.

In this case, Petitioner refused to collaborate to find an acceptable mitigation alternative, but put forth just one very modest proposal of his own. He proposed the preservation of his remaining 11 acres at the site as mitigation for the 3.7-acre impact area, a "mitigation ratio" that was approximately 3:1. (T187). As Petitioner's own wetlands expert later conceded at trial, this proposed mitigation ratio was less than one-third of the minimum required by state mitigation guidelines.[4] (T187-88). District staff could not accept Petitioner's modest mitigation proposal under the guidelines and commented:

> Essentially, it allows the loss of one acre of wetland for the preservation of three, a three to one ratio. If you did that on every parcel of property that was proposed for development the state would lose 25 percent of its wetlands and that would be an unacceptable cumulative loss of wetlands.

(R1685 (Board Tr.).

When the District informed Petitioner that his permit could not be issued under his initial mitigation proposal, it also generated three other mitigation alternatives for Petitioner's consideration. As a fourth option, the District encouraged him to develop his own alternatives. As Petitioner

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[4] In 1988, Florida authorized preservation mitigation through conveyance of a conservation easement and established that preservation mitigation "will not be granted [at] a ratio lower than 10:1." (R1702-1704 (Fla. Dep't of Env. Reg., *Policy for "Wetlands Preservation-as-Mitigation,"* June 20, 1988)).

stipulated in the trial court, the District suggested "several design alternatives ... to reduce and offset the adverse impacts ... so that the District could permit the proposed project." Pet.App. E-1. And the District would "favorably consider equivalent mitigation enhancement options on other properties within the Basin proposed by [Petitioner]." Pet.App. E-3. But Petitioner would not accept any District-proposed alternatives or suggest his own alternatives; he insisted on his project on his terms.

The District's Board asked if Petitioner would like 30 additional days to consider mitigation alternatives, but this opportunity was rejected. (R1683 (Board Tr.)). Petitioner insisted that the District grant his "single [mitigation] offer," which they could not because it failed state guidelines. *Id.* His permit applications were denied. (R1681, 1686 (Board Tr.)).

The District Board's final order made clear that, although the permits were denied due to insufficient mitigation, Petitioner could have proposed "equivalent off-site mitigation enhancement options on other properties within the basin." [5] (R1628 ¶18). The final order mentioned two possible alternatives where off-site wetland enhancement mitigation could have been completed, but not because Petitioner had

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[5] Off-site mitigation must occur within the same drainage basin as the subject property because Florida law (Fla. Stat. § 373.414(8)(a)) requires the Board to consider the cumulative impacts of wetland destruction within the basin when evaluating a permit application. "In-basin" mitigation avoids cumulative impacts within the same basin.

to complete these specific projects to get a permit. (R1627-1628 (describing the Hal Scott Preserve and the Demetree Property). Rather, these "example" sites were referenced in the order to make clear that currently accessible mitigation alternatives were immediately available to Petitioner. Petitioner knew that there was no requirement to mitigate on District-owned sites and that other mitigation sites would be "favorably considered." Pet.App. E-3. In the end, Petitioner flatly opposed any additional mitigation beyond his first and only proposal. For him, his mitigation offer was "as good as it can get"; unfortunately, however, it was not good enough under state-established guidelines for the District to approve his permits. (R1683 (Board Tr.)).

B. State Court Proceedings

1. The Trial Court Finds That Real Property Was Taken Under *Agins*.

As recognized by the Florida Supreme Court, this case has an extended procedural history. Pet.App. A-3. Petitioner first filed the case in 1994. But prior to final resolution in the trial court, the Fifth District Court of Appeal had reviewed issues involving Petitioner's takings claim on three occasions. The Fifth District reversed an initial determination by the trial court that Petitioner's takings claim was not ripe and remanded the matter for a trial. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560, 562 (Fla. Dist. Ct. App. 1998) (*Koontz I*), *review denied*, 729 So. 2d 394 (Fla. 1999). After the trial court determined that a taking occurred, the Respondent District twice attempted to appeal, but the appellate court concluded that the

trial court orders did not constitute appealable orders. *See St. Johns River Water Mgmt. Dist. v. Koontz,* 861 So. 2d 1267, 1268 (Fla. Dist. Ct. App. 2003) (*Koontz II*); *St. Johns River Water Mgmt. Dist. v. Koontz,* 908 So. 2d 518, 518 (Fla. Dist. Ct. App. 2005) (*Koontz III*).

This case has traveled to this Court under an amended complaint filed in 1997, in which Petitioner alleged a temporary and permanent regulatory taking under *state law*. His takings claim was pled exclusively under "Article X, Section 6, of the Florida Constitution" (R375 ¶48 (Am. Compl.)), and Petitioner "explicitly reserve[d] the right to assert all federal claims ... for later resolution by a federal court." (R368 ¶18; R375 ¶47 (incorporating paragraph 18) (Am. Compl.)).

The theory for Koontz's state law takings claim derived from *Agins v. City of Tiburon,* 447 U.S. 255 (1980). He alleged that the District's order "deprive[d] Koontz of the economically viable use of his property" (R375 ¶49 (Am. Compl.)); "restrict[ed] the use and destroy[ed] the economically viable use of Koontz's property" (R376 ¶52 (Am. Compl.)); and "does not serve a public purpose." *Id.* (¶ 53).[6]

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[6] It is notable for purposes of reviewing the instant Petition—in which the central issue is framed in terms of an exaction of "money and labor" (Pet. 15)—that Petitioner initially framed his claim as a taking of real property. In addition to multiple references in the Amended Complaint to real property as the property subject to the taking claim (R365 ¶1 and ¶4; R375 ¶49; R376 ¶52 and ¶54), the Joint Pretrial Statement's "admitted facts" section always describes the "subject property" of the taking claim as real property: "The subject property was

Ultimately, in 2002, the trial court ruled for Petitioner. Pet.App. D-1, 11. The trial court framed its ruling under *Agins* upon which Petitioner had "relied" (*id.*, D-5, 8), but its rationale also borrowed from *Nollan* and *Dolan* (*id.*, D-11), cases that the order otherwise dismissed as being "clearly distinguishable in fact and legal principle," *id.*, D-8. The court found the District to have taken Petitioner's real "property" (*id.*, D-1), not his "money" or "labor." And it ordered damages to be paid "for the temporary taking of [Petitioner's] property." Pet.App. C-1. The District appealed.

2. Florida Appellate and Supreme Court Decisions.

On appeal to the Fifth District Court, a sharply divided panel also ruled for Petitioner. Pet.App. B. Each judge wrote a separate opinion. *Id.* The dissent questioned how there could be inverse condemnation of Petitioner's real property when, in the

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a part of ... [Koontz's] real property," (R618 §II(D)); Petitioner applied to the District for "...[permits] to dredge and fill 3.4 acres of wetlands on the subject property," (R618 §II(E)); "the subject property lies almost entirely within the Riparian Habitat Protection Zone of the [Econ Basin] ... and is subject to the District's regulatory jurisdiction," (R618 §II (G)); "approximately 11 acres of the subject property were herbaceous wetlands," (R618 §II(I)); & "[t]he exhibit identified as 'Boundary sketch of property Koontz purchased in 1972' is an accurate representation of the boundaries of the property Koontz purchased in 1972, a purchase that included the property that is the subject of this litigation." (R619-620 §II(T)).

constitutional sense, nothing had been taken. *Id.*, B-20. The two-judge majority upheld the taking of Petitioner's real property under an exaction taking theory. *Id.*, B-10. The majority saw the issue as being "whether an exaction claim is cognizable when, as here, the land owner refuses to agree to an improper request from the government resulting in the denial of the permit." *Id.*, B-6. Although the Fifth District discussed in dicta whether there could be exaction takings of money, it did not find an exaction taking of money or of the cost of off-site mitigation. It found instead an exaction taking of Petitioner's real property. *Id.*, B-10.

The District appealed to the Florida's Supreme Court, which then reversed the Fifth District Court's decision. Surveying this Court's decisions in the area of exaction takings, the Florida Supreme Court determined that an exaction taking of real property could only occur where the exaction involved a dedication of real property and where the regulatory agency actually issues a permit in exchange for the dedication. Pet.App. A-19. Finding neither circumstance present in this case, Florida's Supreme Court quashed the appellate decision. Pet. App. A-21. Petitioner now seeks review in this Court.

ARGUMENT

I. This Court Lacks Jurisdiction Because Petitioner Did Not Allege A Federal Takings Claim, But Reserved "All" Of His Federal Claims.

The Petitioner pegs this Court's jurisdiction under 28 U.S.C. 1257(a), on the basis of having filed a lawsuit in state court that alleges a federal constitutional claim. Pet. 1; *see also* U.S. Sup. Ct. R. 14(g)(i) (requiring that a Petition set forth "when the federal questions sought to be reviewed were raised [and] the method or manner of raising them ... so as to show that the federal question was timely and properly raised and that this Court has jurisdiction"). Specifically, Petitioner claims to have filed an "inverse condemnation lawsuit in the Florida state courts challeg[ing permitting] decisions as violating the Fifth and Fourteenth Amendments of the United States Constitution." Pet. 1.[7]

But Petitioner did not file this lawsuit under the United States Constitution at all. Rather, he pled four carefully delineated *state law* claims, including one regulatory takings claim under the Florida Constitution. Count III states: "This is an

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[7] In fact, the Petition repeatedly claims that Petitioner alleged a federal takings claim: that he "Sue[d] for Inverse Condemnation Under *Nollan* and *Dolan*" (Pet. 4); that his "inverse condemnation suit . . . alleged that the District's off-site improvements condition was unconstitutional under the Fifth and Fourteenth Amendments" (Pet. 4); and that he "clearly stated a cognizable claim for regulatory taking under this Court's precedents and the Takings Clause of the U.S. Constitution" (Pet. 25).

action . . . arising out of the taking of the Plaintiff's property . . . without compensation in violation of Article X, Section 6, of the Florida Constitution." (R375 (Am. Compl. ¶48)). Nowhere did Petitioner's lawsuit assert a takings claim under the Fifth and Fourteenth Amendments.

Furthermore, not only did Petitioner *not* allege a federal constitutional claim, but paragraph 18 of his Amended Complaint expressly disclaimed "all" federal claims in his lawsuit:

> 18. Koontz explicitly reserves the right to assert all federal claims arising out of the same incidents or occurrences alleged herein for later resolution by a federal court, pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) and *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992).

(R368; R375 (Am. Compl. ¶47)). Petitioner readopted and realleged paragraph 18's disclaimer in his Count III takings claim "as if [it] were fully rewritten herein." (R375).

That no Fifth or Fourteenth Amendment claim was alleged in Petitioner's lawsuit is also clear from the certified question framed by the District Court of Appeal to the Florida Supreme Court:

> WHERE A LANDOWNER CONCEDES THAT PERMIT DENIAL DID NOT DEPRIVE HIM OF ALL OR SUBSTANTIALLY ALL ECONOMICALLY VIABLE USE OF THE PROPERTY, DOES

> ARTICLE X, SECTION 6(a) OF THE FLORIDA CONSTITUTION RECOGNIZE AN EXACTION TAKING UNDER THE HOLDINGS OF *NOLLAN* AND *DOLAN* WHERE, INSTEAD OF A COMPELLED DEDICATION OF REAL PROPERTY TO PUBLIC USE, THE EXACTION IS A CONDITION FOR PERMIT APPROVAL THAT THE CIRCUIT COURT FINDS UNREASONABLE?

Pet.App. A-2 n.1 (emphasis added).[8]

So contrary to the Petition's jurisdictional claim, Petitioner did not file a lawsuit alleging a federal claim sufficient to confer jurisdiction under 28 U.S.C. § 1257(a).[9] For purposes of § 1257(a), that a federal right or privilege is "specially set up or

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[8] That the Florida Supreme Court's opinion later rephrased the question to reference the Fifth Amendment does not change the fact that Petitioner did not assert, and the lower courts did not decide, a federal claim in this case. Instead, Petitioner reserved his federal claims for federal court.

[9] 28 U.S.C. § 1257(a) states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

claimed" has long set strict parameters for this Court's jurisdiction. *Illinois v. Gates*, 462 U.S. 213, 217-218 (1983). In the words of one early case, this Court's jurisdiction depends upon a party "plainly and distinctly" indicating that rights are being claimed under the constitution, treaties, or statutes of the United States. *F.G. Oxley Stave Co. v. County of Butler*, 166 U.S. 648, 654-655 (1897).

> [A party] must so declare; and, unless he does so declare 'specially' (that is, unmistakably), this court is without authority to re-examine the final judgment of the state court.

Id. See also Howell v. Mississippi, 543 U.S. 440, 444 (2005) (dismissing case as improvidently granted where a claim was not properly presented as arising under federal law). Here, in contrast, by filing only a claim under state law and reserving "all" federal claims for later resolution, Petitioner has not "unmistakably" asserted a federal right or privilege. Consequently, the Petition should be denied on jurisdictional grounds.

II. The District Did Not Exact Money Or Improvements To District Land.

Beyond the major jurisdictional problem with the Petition, no exaction occurred in this case that would support Petitioner's theory of the case. That is, the Petition erroneously states that the District "conditioned permit approval upon the dedication of Koontz's money and labor [on District property]." Pet. 15.

First, the District did not require any money or labor on District property as a condition of approving Koontz's permit applications. Per Florida's established wetlands mitigation program, the District only required that Petitioner satisfactorily mitigate the damage from his proposed project and destruction of wetlands in *any* legally sufficient way. *See also* Fla. Stat. § 373.414(1)(b) (encouraging the applicant to propose acceptable mitigation and giving the applicant *alone* the responsibility of choosing the form of mitigation).

The District laid out some alternative mitigation proposals and told Petitioner to submit his own if he did not like District-proposed alternatives. Pet.App. E-3; R1628 ¶18 (Final Order). The final order described various of the potential alternative mitigation options—including a reduction of impacts, a combination of on-site and off-site mitigation, and mitigation located entirely off-site—but also contained the specific suggestion that "equivalent off-site mitigation enhancement options on other properties within the basin could also be developed and proposed by Koontz."[10] (R1628 ¶18). The final order likewise makes clear that although the permit was denied due to insufficient mitigation, it did not demand that Petitioner

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[10] Any off-site mitigation had to be somewhere within the Econ Basin because section 373.414(8)(a), Florida Statutes (1993), required the Board to consider the cumulative impacts of wetland destruction within the same drainage basin when evaluating a permit application. "In-basin" mitigation avoids having cumulative adverse impacts within the same basin.

perform work on District property or on any other specific parcel of property. (R1623-1632).[11]

Not only did Petitioner turn down District-offered alternatives, but he never cooperated in the process or offered any alternative beyond his one and only first offer. *Cf. Plantation Landing Resort, Inc. v. United States,* 30 Fed. Cl. 63, 69 (1993), *aff'd without pub. op.,* 39 F.3d 1197 (Fed. Cir. 1994), *cert. denied,* 514 U.S. 1095 (1995) (rejecting a takings challenge to the denial of a dredge and fill permit where the Army Corps of Engineers assisted plaintiff in the regulatory process by providing several mitigation alternatives which plaintiff rejected). He also did not appeal or seek administrative review of the District's action directly, Pet.App. A-22. Instead he sued. Now to bolster his "extortion" claim, Petitioner cannot legitimately recast the various mitigation alternatives offered by the District as being "extortionate demands." They simply were not.

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[11] Because Petitioner's application proposed preservation that encompassed the remainder of his on-site property, additional mitigation required to offset impacts would necessarily be off-site, either on other property owned by Petitioner or on property owned by some other person or entity. (T247). District staff could readily access District-owned property to evaluate mitigation opportunities. And thus its final order described two District-owned properties within the Econ Basin (the Hal Scott Preserve and the Demetree Property) where off-site wetland enhancement mitigation could occur. (R1627-1628, ¶¶13 & 17). The final order, however, expressly refers to them as "example sites" for wetland enhancement and did not in any way limit Petitioner's ability to choose the type or location of off-site mitigation for his project. (R1623-1632).

Second, the court did not actually decide and award damages in this case on the basis of an exaction of Petitioner's "money and labor," but upon his real property having been unlawfully taken. The trial court ordered the District to compensate Petitioner "for the temporary taking of [Petitioner's] property." Pet.App. C-1. The trial court awarded compensation of $327,500, plus interest (Pet.App. C-2), based on Petitioner's expert's estimate of the rental value of the real property during the period of the taking (R1443 (Compensation Trial Tr.). An opinion by this Court on the Petition's Question Presented—which is not predicated on a taking of real property, but instead on an exaction taking of "money and labor"—would seem thus to be to an advisory opinion.

And one more thing, the Petition inflates the amount of mitigation that District-offered alternatives would have cost to enhance 50 acres of wetlands. Petitioner inaccurately states that "Koontz's expert" projected a mitigation cost "between $90,000 and $150,000" to enhance 50 acres. Pet. 4. In fact, Petitioner had *no* such expert and he did not dispute the District's $10,000 mitigation estimate. (R1696 (District's estimate)); (Trial Tr. T3-345). Petitioner *himself* submitted a real property appraisal that validated the District's estimate showing his property with permits to appraise at $457,000 after a reduction of "$10,000 for the enhancement of 50 acres of off-site wetlands" (R1773). Rather, the estimate that Petitioner cites of "between $90,000 and $150,000" came from a wholly

different project estimate by *the District's* expert. *See* R1627-28 ¶¶13-14, 16-17 (Final Order); T148-49.[12] So the undisputed cost estimate for the District-offered mitigation alternative of enhancing 50 acres of wetlands in the basin was not the six-figure sum that the Petition suggests, but only $10,000.

In the end, this case involves no District attempt to exact either Petitioner's money or specific improvements to District property. Instead, this case features a Petitioner who chose *himself* not to cooperate with the District towards resolving a mundane mitigation valuation dispute, and who sued instead of making an effort to resolve his differences administratively.

III. Review Of The Florida Supreme Court's Discussion of Federal Precedent Is Unnecessary.

Finally, even though Petitioner filed a lawsuit alleging state claims and reserved his federal claims for future federal litigation, the Florida Supreme Court's opinion did include a substantial review of this Court's existing takings precedents. *See* Pet.App. A-11-21. But its discussion of this Court's cases, including *Nollan* and *Dolan*, did not misstate the holdings of those cases or create a conflict for purposes of Rule 10 of this Court's rules. In fact, the

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[12] This different District projection provided essentially that by replacing 15 inoperative culverts at a much higher cost, Petitioner could forego having to enhance 50 acres of wetlands or preserve *any* of his 14-acre property as mitigation. R1627 ¶13-14; R1628 ¶¶16-17; T148-49.

Florida Supreme Court's reading of this Court's exaction-takings decisions is consistent with several recent federal circuit court cases. *See, e.g., McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2765 (2009) (requirement to install a storm pipe was not a *Nollan/Dolan* issue); *Iowa Assurance Corp. v. City of Indianola*, 650 F.3d 1094, 1096–97 (8th Cir. 2011) (requirement to an construct a fence around race cars not subject to a *Nollan/Dolan* exactions analysis); *West Linn Corporate Park, LLC v. City of West Linn*, 428 Fed.Appx. 700, 702 (9th Cir. 2011), *cert denied*, 132 S.Ct. 578 (2011) (requirement to construct off-site public improvements created no *Nollan/Dolan* problem).

The Petition suggests this Court should grant review of this case because of conflict among lower courts in the United States regarding the reach of *Nollan* and *Dolan*. Petition 16-27. However, there is no national split of authority on the main issue litigated and decided in this case: whether an exaction that does not involve the landowner's real property, but requires the landowner to spend money to comply with permitting requirements, can result in the inverse condemnation of the real property that the landowner seeks to develop. The District could not locate even one un-reversed court decision akin to this case in which a court found an exaction taking of real property based on government demanding something other than real property as a prerequisite for a permit. In other cases, the property found to have been taken was the property government demanded in exchange for permit issuance.

There is also no split of authority as to the subsidiary issue in this case, whether a permit denial can support an exaction taking. Although the appellate court below suggests that four state and lower federal court decisions support such an application (Pet. App. B-8), a close reading of the cases shows that three of the four are inapposite. *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 623-24 (Tex. 2004) involved a challenge to conditions of a regulatory approval. *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), predated *Nollan* and *Dolan*, so it did not address the question of whether *Nollan* and *Dolan* apply to a permit denial. *Salt Lake County v. Board of Education of Granite School District*, 808 P.2d 1056 (Utah 1991), was not a takings case and did not mention *Nollan* or *Dolan*; it was decided solely on state law grounds. In the fourth case, *Goss v. City of Little Rock*, 90 F.3d 306, 309 (8th Cir. 1996), the operative fact was that Little Rock had conditioned approval of a rezoning request "on the dedication by Goss of a portion of his property." In a subsequent appeal, however, the same court stated that the application for rezoning was denied. *Goss v. City of Little Rock, Ark.*, 151 F.3d 861, 862 (8th Cir. 1998). Thus, there appears to be, at most, only one fifteen year-old case, other than the appellate decision below, where *Nollan* and *Dolan* were applied to a permit denial. *Goss* and the appellate decision in the instant case do not constitute a body of conflicting law that demands resolution by this Court.

Before this Court decided *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), a nation-wide split of authority arguably did exist as to whether there

could be an exaction taking of money or the cost of a permitting requirement, where government, as a quid pro quo for permit issuance, required the landowner to donate money or spend money to comply with the permitting requirement. But neither money nor the cost of off-site mitigation was the property claimed or found to have been taken in this case. Even if this Court wished to address the advisory exaction-of-money issue, it would first have to decide whether such an exaction taking could arise in the context of a permit denial, an issue about which there is no conflict and has not been fully vetted in lower court decisions.

Because the Florida Supreme Court's decision is correct and consistent with recent federal circuit court cases, this case does not merit a commitment of this Court's scarce judicial resources.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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REPLY BRIEF

Supreme Court, U.S.
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No. 11-1447

In the

Supreme Court of the United States

COY A. KOONTZ, JR.,
Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Florida

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For over eleven years, a Florida land use agency refused to issue any of the permits necessary for Coy A. Koontz, Sr., to develop his commercial property. The reason was because Koontz would not accede to a permit condition requiring him to dedicate his money and labor to make improvements to 50 acres of government-owned property located miles away from the project—a condition that was determined to be wholly unrelated to any impacts caused by Koontz's proposed development. A Florida trial court ruled that the agency's refusal to issue the permits was invalid and effected a temporary taking of Koontz's property, and awarded just compensation. After the appellate court affirmed, the Florida Supreme Court reversed, holding that, as a matter of federal takings law, a landowner can never state a claim for a taking where (1) a permit approval is withheld based on a landowner's objection to an excessive exaction, and (2) the exaction demands dedication of personal property to the public.

The questions presented are:

1. Whether the government can be held liable for a taking when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and

2. Whether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand

that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.

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INTRODUCTION

The District opposes Koontz's petition on two grounds, neither of which has any merit. First, the District claims this Court lacks jurisdiction, because Koontz did not allege a federal takings claim in his amended complaint. Not so. The Florida Supreme Court deliberately rewrote the court of appeal's certified question to expressly make reference to a federal taking issue, then analyzed and disposed of that question. *See, e.g.*, Pet. App. A-1 (asking whether "the Fifth Amendment to the United States Constitution . . . recognize[s] an exactions taking" in the District's demands for off-site mitigation); Pet. App. A-6 - A-10, A-13 - A-21 (analyzing Fifth Amendment takings law). A long line of precedent recognizes that, where the highest state court holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, this Court's concern with the proper raising of the federal question in the state courts disappears, and any inquiry into how or when the question was raised in the state courts becomes irrelevant. *See, e.g.*, *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (applying "the elementary rule that it is irrelevant to inquiry . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided" (internal quotation marks and citations omitted)); *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."). This Court has jurisdiction to hear this case.

Second, the District claims the petition does not identify issues worthy of this Court's review. It does so

by rearguing the underlying facts of this case—from the alleged "negotiations" that occurred between the District and Koontz, to the nature and amount of the exaction being challenged. The lower courts, including the Florida Supreme Court, already have resolved these factual issues: The District denied a permit after Koontz refused to submit to its demand that he improve off-site properties—these facts cannot be contested. Pet. App. A-6; Pet. App. B-4 - B-5; Pet. App. D-1, D-4, D-11.

In light of these indisputable facts, it is apparent that this petition raises important federal questions requiring the Court's resolution. Indeed, the Opposition brief's focus on the importance of exactions as regulatory tools makes clear the central point of this litigation: There must be an equitable way for landowners and permitting agencies alike to distinguish those exactions that mitigate for the impacts of a proposed development from those constitutionally infirm exactions that go too far. There is. The "essential nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), provide courts with the analytical framework to make that determination and invalidate excessive exactions that "take" property. But the Florida Supreme Court declined to apply *Nollan* and *Dolan* to exactions of money and other non-real property because doing so would, in the court's opinion, interfere with the flexibility and negotiating leverage necessary for permitting agencies to achieve such goals as preserving and enhancing wetlands. Pet. App. A-19 - A-20.

Certiorari is warranted and should be granted.

CORRECTIONS TO THE DISTRICT'S MISSTATEMENT OF FACTS

The Opposition brief relates a version of the facts that the District argued during the administrative and trial court proceedings. Opp. at 2-9, 14-18. Many of its assertions were rejected below. *See* Pet. App. at D-3 - D5; Pet. App. B-2 - B6; Pet App. A-4 - A7.

First, the District repeatedly asserts that this case did not involve an exaction of money or any other property. Opp. at 14, 18, 21. That is incorrect. The trial court found that the District's final order conditioned permit approval upon Koontz enhancing, at his own expense, 50 off-site acres of wetlands on the District's property.[1] Pet. App. D-1, D-4, D-11. This was to be accomplished by replacing culverts and plugging ditches—a task that the court determined "could cost [Mr. Koontz] between $90,000 and $150,000, but there is evidence it could cost as little as $10,000."[2] Pet. App. at D-4. On review, the state appellate and supreme courts recognized that the trial court had determined that the off-site mitigation demand was an exaction. Pet. App. A-6; Pet. App. B-4 - B-5.

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[1] The District alternatively demanded that Koontz reduce the size of his development to one acre and dedicate the remaining property as a conservation area. Pet. App. A-6; Pet. App. B-4 - B-5; Pet. App. D-4. This alternative, which required an excessive dedication of real property, was rejected as well but was not addressed by the state courts. Pet. App. A, B, D.

[2] The District's quibbles about whose cost estimate is more convincing (Opp. at 17-18) are irrelevant where the trial court entered a finding on the issue. Pet. App. D-4.

Second, the District asserts that Koontz's regulatory takings claim is premature because he did not participate in negotiations that could have resulted in "alternative mitigation proposals." Opp. at 5-7, 14-18. This argument, too, was rejected below. Once the District issued a final order denying his permit applications, Koontz was not required to continue negotiating for alternative mitigation possibilities. *Koontz v. St. John's River Water Mgmt. Dist.*, 720 So. 2d 560, 562 (Fla. Ct. App. 1998) ("There is no requirement that an owner turned down in his effort to develop his property must continue to submit offers until the government finally approves one before he can go to court."), *rev. denied*, 729 So. 2d 394 (Fla. 1999). His regulatory taking claim was ripe. *Id.*

Third, the District overstates the impact that Koontz's proposed development would have on wetlands, and overstates the need to demand off-site mitigation. Opp. at i, 2-4, 16 n.11. The District's mitigation demands were based on its incorrect assessments of project impacts and the existing conditions of the wetlands on Koontz's property. Pet. App. A-7; Pet. App. D-3. Because the District's premises were in error, its demand relying on those premises, that Koontz make improvements to 50 acres of wetlands on public lands, was determined to be wholly unrelated and disproportionate to the impacts of his proposed development. Pet. App. A-6 - A-7; Pet. App. D-11.

And fourth, the District asserts that the trial court did not actually decide Koontz's case under *Nollan* and *Dolan*. Opp. at 7-9, 17 (insisting that the case was decided under *Agins v. City of Tiburon*, 447 U.S. 255 (1980)). Every decision below expressly states

that the case was decided under *Nollan* and *Dolan*. *See* Pet. App. A-6 - A-7 ("[T]he trial court applied the constitutional standards enunciated in *Nollan* and *Dolan*."); *see also* Pet. App. B-5 ("[T]he trial court applied the constitutional standards enunciated by the Supreme Court in *Nollan* and *Dolan*."); Pet. App. D-10 - D-11 (*Nollan* and *Dolan* provide the "constitutional tests applicable to the Koontz property.").

There are no factual disputes in this case; all of these issues were decided below. The questions presented are pure questions of law.

ARGUMENT

I

THIS COURT HAS JURISDICTION

Where a state court of last resort rules on questions of federal constitutional law, any inquiry into how or when the question was raised in the state courts is irrelevant to this Court's exercise of jurisdiction. *Charleston Federal Savings & Loan Ass'n v. Alderson*, 472 U.S. 320, 327-28 (1985). In its opinion below, the Florida Supreme Court explicitly stated that it had taken review of Koontz's case in order to determine two questions of federal takings law. Pet. App. A-1 - A-2. In fact, the court determined that the case was "controlled by the existing interpretation of the United States Constitution by the United States Supreme Court." Pet. App. A-2. The court then extensively analyzed and ruled on those questions of federal constitutional law. Pet. App. A-6 - A-10, A-13 - A-21. So did the appellate and trial courts. Pet. App. B-18 - B-20; Pet. App. D-10 - D-11 (*Nollan* and *Dolan*

provide the "constitutional tests applicable to the Koontz property."). This Court unquestionably has jurisdiction under 28 U.S.C. § 1257(a). *See Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983) (jurisdiction exists where the record establishes that the federal constitutional issues were "either squarely considered or resolved in state court"); *see also Mansell v. Mansell*, 490 U.S. 581, 586 n.5 (1989) (holding that the Court had jurisdiction to review a state court decision where the lower court determined that it was necessary to reach a federal question).

The Opposition, however, insists that this Court does not have jurisdiction over a state court's determination of federal constitutional law because the complaint alleged only a violation of the state constitution. Opp. at 11-14. The District is wrong. For the purpose of establishing this Court's jurisdiction, it is irrelevant when a federal claim was raised in the proceedings below so long as the state court of last resort did, in fact, rule on the federal question. *See Orr*, 440 U.S. at 274-75; *Raley*, 360 U.S. at 436-37. It is enough that the state court "reached and decided" the federal constitutional questions (*Jenkins v. Georgia*, 418 U.S. 153, 157 (1974)) "as though properly raised." *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971).

For these reasons, there is no risk that this Court's exercise of its jurisdiction would be "advisory." *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (a decision is not advisory where the lower decision was controlled by federal law). This Court would be acting well within the jurisdiction conferred by 28 U.S.C. § 1257(a) to grant the petition in this case.

II

THE DECISION OF THE FLORIDA SUPREME COURT RAISES IMPORTANT QUESTIONS OF FEDERAL TAKINGS LAW

The Florida Supreme Court adopted two per se rules of federal takings law that significantly limit the protections guaranteed by *Nollan* and *Dolan*. Pet. App. A-19. First, the court concluded that, as a matter of law, the nexus and proportionality tests will never apply to an excessive exaction of money or any other non-real property. *Id.* And second, the court held that *Nollan* and *Dolan* will not apply where the government denies a permit application because the landowner refuses to accede to an excessive exaction. *Id.* Each of these rulings raises "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c); Pet. at 10-22. In addition, the Florida court's resolution of these questions conflicts with decisions of this Court, and conflicts with decisions from other state courts of last resort and federal courts of appeals. Sup. Ct. R. 10(b), (c).

The District does not dispute that these rulings implicate important questions of federal constitutional law.[3] Opp. at 18-21; Pet. at 10-16, 18-22. Instead, the Opposition makes the naked assertion—without any

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[3] The District cannot credibly dispute the importance of these questions. After all, the lower courts determined that the issues were "of great public importance." Pet. App. A-1 - A-2. And in its pleadings below, the District argued that resolving these questions about the scope and application of *Nollan* and *Dolan* was a matter of great importance to permitting agencies and the public. *See* Initial Brief of Petitioner/Appellant St. John's River Water Management District at 1 (Fla. Sup. Ct., Nov. 16, 2009).

reasoned analysis or explanation—that the Florida court correctly interpreted this Court's takings precedents. Opp. at 18-19. This argument simply presumes to predict the outcome of the merits argument. It does not contest the conflicts set out in the Petition, and does not comment on the advisability of this Court granting certiorari.

Similarly, the Opposition does not disprove the existence of a nationwide split of authority on the question whether *Nollan* and *Dolan* apply to dedications of money, or other personal property.[4] Opp. at 20 (admitting that the conflict exists); Pet. at 16-17. Nor could it credibly do so where the lower courts expressly recognized that they were ruling on matters that are the subject of wide-ranging dispute and a split of authority. Pet. App. A-17 - A-19 & n.3 (recognizing split of authority); Pet. App. B-6 - B-10, B-13 - B-15, B-22, B-24 - B-26, B-30 (discussing the wide ranging debate, split of authority, and conflicts). Instead, all the District can do is point out that the Florida court chose to side with the minority viewpoint on this issue—a viewpoint that the District prefers.[5] Opp. at 19 (citing *West Linn Corporate Park, LLC v. City of West Linn*, 428 Fed. Appx. 700, 702 (9th Cir.), *cert. denied*, 132 S. Ct. 578 (2011); *Iowa Assurance*

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[4] Before admitting that there is a split of authority on this issue, the Opposition tries to deny the existence of any conflict by setting up and attacking a straw man. Opp. at 19 (arguing that it cannot locate any cases discussing whether a monetary exaction can result in inverse condemnation of the underlying property—an issue not raised in the Petition or addressed by the court below).

[5] A majority of state and federal courts hold that *Nollan* and *Dolan* are applicable to all forms of property dedications, including money. *See* Pet. at 16-17 n.4-5.

Corp. v. City of Indianola, 650 F.3d 1094, 1096-97 (8th Cir. 2011); *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), *cert. denied*, 556 U.S. 1282 (2009)). This continuing deep and unresolved split of authority on this important question of federal takings law—twenty-five years after *Nollan*—means that landowners from state to state, and circuit to circuit, are provided significantly different protections under the federal Constitution. This fundamental inequity militates strongly in favor of certiorari.

Ironically, the Opposition discovers a second split of authority that was not identified in the Petition. Opp. at 20. In criticizing the Florida court of appeals' analysis of the question whether *Nollan* and *Dolan* apply where a permit was denied because the landowner refused to accede to an excessive exaction, the Opposition explains that the Florida Supreme Court's ruling on this issue conflicts with a decision from the Eighth Circuit. Opp. at 20 (citing *Goss v. City of Little Rock*, 90 F.3d 306, 309 (8th Cir. 1996); *Goss v. City of Little Rock*, 151 F.3d 861, 862 (8th Cir. 1998)). This conflict provides an additional basis for review. The District's contention that a conflict with one federal circuit court of appeals is an insufficient basis to warrant certiorari is without merit. *See* Sup. Ct. R. 10(b) (Certiorari may be granted where "a state court of last resort has decided an important federal question in a way that conflicts with . . . a United States court of appeals.").

All of this aside, this Court should not lose focus of the fundamental conflict at issue in this case. In *Nollan* and *Dolan*, this Court applied the well-recognized rule that government may not require a person to give up his or her property in exchange for an

unrelated discretionary benefit in the context of land use permitting. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005); *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 837, 841. Accordingly, *Nollan* and *Dolan* placed outer limits on the government's ability to exact excessive or unrelated benefits from landowners. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391. The Florida Supreme Court removed those limits. Pet. App. A-19. The reason it did so was because the court placed a higher value on preserving an agency's permitting discretion than an individual's constitutional rights. Pet. App. A-19 - A-20. The lower court explained that permitting agencies must retain the flexibility and negotiating leverage to achieve their regulatory policies, which includes the imposition of exactions. *Id.* That discretion, the court continued, would be interrupted if landowners were allowed to challenge excessive exactions of money or other non-real property under the nexus and proportionality tests. *Id.* at A-20. The court further speculated that if *Nollan* and *Dolan* applied to excessive exactions of money or other non-real property, agencies would "simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation." *Id.*

Nollan, however, rejected the notion that government needs broad authority to impose development conditions in order to achieve its land use goals. *Nollan*, 483 U.S. at 836-37. Indeed, under such a scheme of limitless agency authority, the *Nollan* Court concluded that one would expect to see more abuses of landowners' rights:

> One would expect that a regime in which this kind of leveraging of the police power is

> allowed would produce stringent land use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not justify the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.

Nollan, 483 U.S. at 837 n.5. The nexus rule, by testing the legitimacy (or illegitimacy) of a development condition, provides a necessary check on agency land use authority. *Nollan*, 483 U.S. at 836-37 ("[A] permit condition that serves the same legitimate police power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.").

The Florida court's interpretation of *Nollan* and *Dollan* conflicts with this Court's decisions at the most fundamental level and, if allowed to stand, will have troubling and far-reaching implications on landowners and government alike.

CONCLUSION

Thus, for the reasons set out above and in the Petition, Koontz respectfully requests that this Court

grant the petition for writ of certiorari, and reverse the decision of the Florida Supreme Court.

DATED: August, 2012.

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JOINT APPENDIX

RECORD
AND
BRIEFS

No. 11-1447

In the

Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

JOINT APPENDIX

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Petition for Writ of Certiorari filed May 30, 2012
Petition for Writ of Certiorari granted October 5, 2012

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

COY A. KOONTZ,

Plaintiff,

v. Case No.: Cl-94-5673

THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and PATRICIA T. HARDEN, LENORE MCCULLAGH, WILLIAM SEGAL, REID HUGHES, JOE E. H.ILL, JAMES H. WILLIAMS, and DENISE M. PRESCOD, each as a member of the Governing Board of the St. Johns River Water Management District,

Defendants.

Mar. 6, 1997	Amended Complaint
Aug. 22, 2002	Joint Pre-Trial Statement
Aug. 16, 2002	Plaintiff's Trial Brief and Response to Defendants Motion in Limine
Nov. 21, 2002	Order Denying Motion for Rehearing

Aug. 28-29, 2002	Transcript excerpts of proceedings
Jun. 18, 2004	Final Judgment: Direct District to Issue Permit or Pay for Property

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2009

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Appellant,

v. CASE NO. 5d06-1116

COY A. KOONTZ, JR., ETC.,

Appellee

Mar. 20, 2009	Order Granting Motion to Certify Issue to Fla. Sup. Ct.

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

COY A. KOONTZ,

Plaintiff,

v.

FILED Mar. 6, 1997

Case No.: Cl-94-5673

THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and PATRICIA T. HARDEN, LENORE MCCULLAGH, WILLIAM SEGAL, REID HUGHES, JOE E. H.ILL, JAMES H. WILLIAMS, and DENISE M. PRESCOD, each as a member of the Governing Board of the St. Johns River Water Management District,

Defendants.

_____/

AMENDED COMPLAINT

COMES NOW the Plaintiff, COY A. KOONTZ, by and through his undersigned attorneys, and brings this his action against the Defendants, THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and PATRICIA T. HARDEN, LENORE MCCULLAGH, WILLIAM SEGAL, REID HUGHES, JOE E. HILL, JAMES H. WILLIAMS, and DENISE M. PRESCOD, each as a member of the Governing Board of the St. Johns River Water Management District, and for cause would state:

1. The Plaintiff, COY A. KOONTZ, hereinafter referred to as "Koontz," is the owner of certain real property located in Orange County, Florida, as is more particularly described in Exhibit "A," attached hereto and incorporated herein by reference. The property is comprised of approximately 14.9 acres and was purchased by Koontz in 1971, at which time there were no deed restrictions or regulations that would indicate any restrictions of use. At all times Koontz has held the subject property with a reasonable investment-backed expectation to sell and utilize the proceeds as a retirement benefit. The value of the property exceeds $15,000, exclusive of interest, costs, and attorney's fees.

2. Defendant, THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, hereinafter referred to as "SJRWMD" and or "District," is a special taxing district existing pursuant to the provisions of Section 373, Florida Statutes.

3. Defendants, PATRICIA T. HARDEN, LENORE MCCULLAGH, WILLIAM SEGAL, REID HUGHES, JOE E. HILL, JAMES H. WILLIAMS, and DENISE M. PRESCOD, are members of the Governing Board of the District pursuant to Chapter 373 and collectively are empowered to render all decisions on behalf of the District material to this action. At all times material herein, the individual members were acting in their official capacity and will hereinafter be referred to collectively as the "Board." Said Board members are named as Defendants in their official capacity only and no relief is sought against those Defendants in their individual capacity.

4. The property which is the subject of this action is located on a tributary of the Econlockhatchee River

in an area designated by SJRWMD as the "Econlockhatchee River Hydrologic Basin," specifically, as designated by Rule 40C-4.041(2)(b)6, Florida Administrative Code, and referred to in Rule 40C-41.063(5)(d)1, Florida Administrative Code, as the "Econlockhatchee Riparian Habitat Protection Zone."

5. At all times material, Defendants have asserted jurisdiction over Koontz's property under said Rules.

6. District jurisdiction over Koontz's property purports to require a Management and Storage of Surface Water ("MSSW") Permit and a Wetlands Resource Management ("WRM") Permit. Koontz applied for those permits and paid the necessary permit fees.

7. In a "preapplication" meeting with representatives of the District, Koontz was told that the aforesaid Riparian Habitat Protection Zone, hereinafter referred to as "RHPZ" or "Zone," encompassed more than fourteen and one-half (14 1/2) acres of the subject property. Elizabeth R. Johnson and Mary Barb ham of the SJRWMD told Koontz that he could not develop his property without both on-site and off-site mitigation which included the deeding of part of Koontz's property for a conservation easement to the District. When Koontz objected and was unwilling to deed a property interest to the District, District staff members told him that without such "mitigation" the property could not be utilized.

8. Under duress and extortion, Koontz proposed a base plan which would, in effect, allow the development of five acres north of the alleged flood plain line and, in turn, he would deed ten acres of his

property as a conservation area to the District. SJRWMD staff would not accept the base plan and insisted on a modified plan from five (5) acres to three and one-half (3 ½) acres with eleven and one-half (11 ½) acres of the remaining property being placed in a conservation easement with some off-site mitigation. District staff told Koontz that if the staff proposed modification was submitted to the Board, the staff would recommend for approval.

9. When the plan was submitted, the District staff recanted and stated that the mitigation proposal was not sufficient and recommended denial of the application.

At no time did Koontz voluntarily agree to place any portion of his property into a conservation easement or to conduct on-site or off-site mitigation.

10. At the meeting before the Governing Board on May 10, 1994, to review Koontz's application, the District staff made it clear that the property could not be developed or utilized without the implementation of a mitigation plan which would require Koontz to enhance fifty acres of state-owned property and clean and maintain drainage culverts situated off-site. This mitigation would require Koontz to pay an enormous amount of money to the State through the purchase of property and the expenditure of funds just to utilize his own property which would directly destroy any remaining economical, viable use of his own property. Under the circumstances, this mitigation. plan and all mitigation plans proposed by the SJRWMD at all material times would deny economically viable use of Koontz's property.

11. At the meeting before the Governing Board on May 10, 1994, District staff advised that Koontz could not develop his property without off-site mitigation, which, combined with other development costs, rendered the property useless for development and all other economically viable use of the property. A copy of the transcript of the District meeting of May 10, 1994, is attached as Exhibit "B" and by reference made a part hereof.

12. On June 9, 1994, Defendants entered a Final Order denying Koontz the WRM Permit, a copy of which is attached hereto as Exhibit "C".

13. On June 9, 1994, Defendants entered a Final Order denying Koontz the MSSW Permit, a copy of which is attached hereto as Exhibit "D".

14. Defendants SJRWMD and Board made it clear that the ample mitigation coerced out of Koontz was insufficient to obtain the issuance of a MSSW or WRM permit and further advised Koontz that any permitting of Koontz's property would be subject to the onerous and confiscatory requirement that Koontz convey an easement on the vast majority of his property to the State of Florida for a conservation easement, as well as other and further mitigation.

15. Koontz has exhausted all administrative remedies available to him or, in the alternative, any administrative remedy would be futile.

16. As a result of the acts and conduct of the Defendants herein, Koontz has been required to obtain the services of the undersigned counsel and is obligated to pay his attorney a reasonable fee for his services.

17. Koontz demands a trial by jury on all issues so triable, and all conditions precedent to the filing of this suit have been fulfilled.

18. Koontz explicitly reserves the right to assert all federal claims arising out of the same incidents or occurrences alleged herein for later resolution by a federal court, pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), and *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992).

COUNT I
DECLARATORY AND INJUNCTIVE RELIEF

19. The Plaintiff readopts and realleges Paragraphs 1 through 18, as if each were fully rewritten herein.

20. This is an action for declaratory and injunctive sought against Defendants under the provisions of Chapter 86, Florida Statutes, and the equitable powers of this Court, for the purpose of determining the validity and the constitutionality of Sections 373.415 and 373.413, Florida Statutes.

21. St. Johns River Water Management District Rules 40C-4.041 and 40C-41.063, were enacted based on the aforementioned enabling statutes, and result in the diminution and/or taking of a protected property interest through the permitting process and the criteria used to determine permittability without compensation. The Rules attempt to describe a hydrological basin's riparian habitat protection zone and define the permitting criteria, all of which are hereinafter referred to as "Rules".

22. Section 373.415, Florida Statutes, since 1988, has required the St. Johns River Water Management District to adopt rules establishing protection zones adjacent to the watercourses in the Wekiva River System. The factors on which the width of the zones are to be determined are explicitly set out in said statute, as are other requirements and duties of the District.

23. The constitutional infirmity lies in Paragraphs (4) and (5) of Section 373.415, which, among other things, purport to allow the District to have similar powers and duties "for other watercourses." Said paragraphs do not outline what watercourses are specified, nor what areas outside the Wekiva River Protection Area are specified, and thus gives the SJRWMD the power to make law, which is a power reserved to the Legislature under Article II, Section 3, of the Florida Constitution.

24. Further, said paragraphs do not provide any guidelines for the District, and thus provide no check on arbitrary and capricious actions by the District once the District selects a watercourse it wishes to regulate. The District may regulate any watercourse carte blanche since the only guidance given to the District is the phrase, "similar protection zones." This vague direction does not allow the District, the courts, or the citizenry to determine whether the District has complied with the Legislature's intent.

25. Said paragraphs do not delineate legislative priorities among competing areas and resources which require protection, and thus the Legislature has unconstitutionally delegated its power to an administrative agency.

26. Section 373.413, Florida Statutes, delegates the power to the District the lawmaking power to determine areas within the district wherein permits may be required for construction or atteration of storm water management systems, and to put "reasonable conditions" on those permits. No guidance is given by the Legislature on how to make such determinations.

27. The legislative non-delegation doctrine prevents such enactments by the Legislature, under Article II, Section 3, of the Florida Constitution.

28. An actual controversy exists between the Plaintiff and the Defendants which has to be determined by the Court as hereinafter more fully appears.

29. The Plaintiff is in doubt as to his right, status, immunity, power, or privilege and there is a bona fide, actual and present need for a declaration of this Court for which prayer is hereinafter made.

30. Unless the Defendants are enjoined from implementing or applying the above statutes to Plaintiff's property, Plaintiff will suffer irreparable harm.

31. Plaintiff lacks an adequate remedy at law to prevent the unconstitutional enactment or application of the statutes, and the rules based upon them, to Koontz's property.

32. Plaintiff has retained undersigned counsel and is entitled to costs and attorney's fees pursuant to § 86.081, Florida Statutes.

WHEREFORE, Plaintiff, COY A. KOONTZ, respectfully prays that this Court:

A. Enter a declaratory judgment pursuant to Chapter 86, Florida Statutes, stating that Sections 373.415 and 373.413, Florida Statutes, which purport to grant the District the authority to establish a Riparian Habitat Zone on watercourses outside the Wekiva River Basin, violate Article II, Section 3, of the Florida Constitution;

B. Enter a declaratory judgment and supplemental injunctive relief requiring that all applications denied by the District or the Board as a result of the implementation of the improper and illegal Riparian Habitat Protection Zone, enacted pursuant to the above unconstitutional statutes, be revisited and notification to each and every property owner affected by the alleged, invalid Riparian Habitat Zone be notified by certified mail of the imposition of the alleged RHPZ and the ruling of this Court that the same is invalid; and,

C. Award Plaintiff's costs and attorney's fees;

D. Grant such other relief as this Court may deem proper.

COUNT II
DECLARATORY AND INJUNCTIVE RELIEF

33. Plaintiff readopts and realleges paragraphs 1 through 18, as if each were fully rewritten herein.

34. This is an action for declaratory and injunctive relief against Defendants pursuant to Chapter 86, Florida Statutes, for the purpose of determining the validity and constitutionality of Florida Statutes § 373.414, which unconstitutionally places the burden upon an applicant for a land use permit to prove

"reasonable assurances" that the proposed project is not contrary to the public interest.

35. In denying Koontz's application for the property, the District and Board have relied upon § 373.414, formerly § 403.918, Florida Statutes, as the basis for enacting its Rule 62-312.080, formerly Rule 17-312.080, and Rule 40C-4.302, Florida Administrative Code.

36. It is impossible for Koontz and others like-situated to meet the requirements of said statute as the same is vague and ambiguous on its face, thus subjecting the cited provision to arbitrary and capricious application by the District, Board, and their representatives.

37. Florida Statutes § 373.414 outlines seven criteria which are referred to as the "Public Interest Test." The criteria are set forth below:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archeological resources under the provisions of § 267.071; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

38. Section 373.414 unconstitutionally shifts the burden of proof from the District and Board to the applicant to prove an activity is not a threat to the public interest. This purported shift of the burden of proof violates State law. An applicant cannot overcome the presumption that the activity is not in the public interest because the rule is vague, arbitrary and capricious and vests unbridled discretion in the District, Board, and their employees.

39. The statute is grossly inadequate to ensure protection of Florida constitutional property rights or restrain individual employees of the District and Board from arbitrary and capricious acts. The rule bears no reasonable standard for the burden of proof and the terminology "reasonable assurances, . . . in and of itself, is vague, arbitrary and unconstitutionally shifts the burden of proof of harm or injury from the District and Board to the applicant.

40. Koontz is in doubt as to his rights, status, immunity, power or privileges and there is a bona fide, actual and present need for a declaration of this Court, for which prayer is hereinafter made.

41. Section 373.414 allows the District and Board to employ a pattern of abuse and arbitrary action which can be discernible from other permit denials.

42. The statute, because of its vagueness and placement of unbridled authority in the District and Board, allows malicious, irrational and patently arbitrary actions which are not within the legitimate purview of the District's or Board's police power, and should be declared invalid.

43. Rule 62-312.080, formerly Rule 17-312.080, and Rule 40C-4.302, Florida Administrative Code, derive their authority from § 373.414, and are therefore invalid as well.

44. Unless the Defendants are enjoined from implementing or applying the statute to Plaintiff's property, Plaintiff will suffer irreparable harm.

45. Plaintiff lacks an adequate remedy at law to prevent unlawful and unconstitutional application of the statute to him and his property.

46. Plaintiff has retained undersigned counsel and is entitled to costs and attorney's fees pursuant to § 86.081, Florida Statutes.

WHEREFORE, Plaintiff, COY A. KOOTNZ, respectfully requests this Court to:

A. Enter a declaratory judgment declaring Florida Statute § 373.414, the seven criteria for the "Public Interest Test" therein, and also Rules 62-312.080 and 40C-4.302, which are based thereon, to be invalid and unconstitutional under the Florida Constitution as overbroad, vague, ambiguous, and vesting unbridled authority in the District, thus permitting arbitrary and capricious application.

B. Enter an injunctive order prohibiting the District or the Board from implementing or utilizing the provisions of Florida Statutes § 373.414, or Rules 62-312.080 and 40C-4.302, to deny or consider an application for a land use permit.

C. Award Plaintiff costs and attorney's fees;

D. Grant any and all further relief as this Court may deem appropriate.

COUNT III
REGULATORY TAKING
(TEMPORARY AND PERMANENT)

47. The Plaintiff readopts and realleges paragraphs 1 through 18, as if each were fully rewritten herein.

48. This is an action for equitable relief and damages in excess of $15,000.00, exclusive of costs, interest and attorney's fees, arising out of the taking of the Plaintiff's property for public use or public interest without compensation in violation of Article X, Section 6, of the Florida Constitution.

49. The SJRWMD and Board have rendered a final decision denying Koontz pennits for development of his property, which decision deprives Koontz of the economically viable use of his property.

50. The District and Board have enacted official rules and policies, among others, Rule 40C-4.041 (2)(b)6 and 40C-41.063(5)(d), Florida Administrative Code, ostensibly pursuant to legislative authority, which (in tandem with other rules) purport to impose stringent permitting requirements for owners of property located within the Econlockhatchee River Hydrologic Basin and the Econlockhatchee Riparian

Habitat Protection Zone ("RHPZ"). The Rules enacted and imposed by the District and Board do not bear a reasonable relationship between the required dedication and the impact of the proposed development, and are thus not roughly proportional.

51. SJRWMD rules, when applied to Kootz's property, do not substantially advance a legitimate state interest. The District and Board rendered a final decision which severely limits the practical use of his property, and have denied Koontz just compensation, in violation of Florida Statutes § 187.201(15).

52. The entry of the Final Order by the Board and District, and the basis for the same set forth therein, restricts the use and destroys the economically viable use of Koontz's property.

53. The denial of the use of the property and the imposition of a conservation area does not serve a public purpose. The actions of the District and Board forced the Plaintiff to hold out his property without any reasonable use thereof for public purpose to protect the plant, animal and wildlife habitat without any evidence the property was suitable for the same.

54. The actions of the Board in accepting the direction and recommendations of the staff render it futile for Koontz to go forward with another meaningful application since the mitigation requirements set at the Board meeting, and the cost of mitigation, are impossible to accomplish while maintaining an economical viable use in the property.

55. The acts of SJRWMD and Board, in mandating the conveyance of a conservation easement and other onerous mitigation conditions as a condition to any use of Koontz's property, renders further efforts to acquire

permits for the property impossible and constitutes a taking of the property.

56. Plaintiff has retained undersigned counsel and is entitled to the recovery of attorney's fees and costs, pursuant to the Constitution of the State of Florida.

WHEREFORE, Plaintiff, COY A. KOONTZ, respectfully requests this Court:

A. Enter a Judgment finding that the District and Board have taken the Plaintiff's property through regulatory action and are required to pay Plaintiff just compensation, together with all fees and costs incurred;

B. Determine and establish the date of taking as the date of the denial of Koontz's permits on May 10, 1994;

C. Award Plaintiff's costs and attorney's fees;

D. For such other and further relief as the Court deems just and proper.

COUNT IV
DECLARATORY RELIEF: UNCONSTITUTIONAL INTERFERENCE WITH CONSTITUTIONAL PRIVACY RIGHTS

57. Plaintiff readopts, realleges and incorporates herein each and every allegation set forth in paragraphs 1 through 18.

58. This is an action for declaratory relief against Defendants, pursuant to Chapter 86, Florida Statutes, in that Plaintiff has a present need for a declaration of his constitutional rights and there exists an actual, bona fide dispute with the Defendants concerning the interpretation of the Florida Constitution.

59. Plaintiff has a constitutional privacy right pursuant to Article I, Section 23, of the Florida Constitution, and a legitimate expectation of privacy to be free from governmental intrusion into his plans to use private property to the exclusion of others, as long as said use is lawful and causes no harm.

60. The failure and refusal of the SJRWMD and Board to permit use of the subject property because of arbitrary and capricious application or interpretation of statutes and rules is an unconstitutional intrusion into the Plaintiff's privacy rights guaranteed under Article I, Section 23, of the Florida Constitution.

61. The effect of the Final Order is to render the subject property a protection zone for animal and plant life but, in fact, serves no compelling state interest. Said administrative actions do not substantially advance any environmental concerns that may not othervllise be handled with less intrusive means.

62. While Plaintiff does not have an unbridled constitutional right to utilize his property, the State must have a cornpelling state interest in denying Plaintiff his intended use of the property. Neither the Protection Zone designated by the Defendants, nor the mitigation requirements of the Defendants, satisfy the compelling state interest test.

63. There are less intrusive conditions that would allow the Plaintiff to utilize his property without the application of the unconstitutional, arbitrary, capricious and invalid Rules of the District.

WHEREFORE, Plaintiff, COY A. KOONTZ, respectfully prays this Court:

A. Take jurisdiction of the parties and find that Defendants have unconstitutionally interfered with the Plaintiff's privacy rights by intruding without a compelling reason into and on Plaintiff's property by the imposition of a protection zone and the restriction of Plaintiff's use of his property;

B. To prohibit the Defendants' conduct and remove said improperly imposed easement or "zone."

C. For such other relief as this Court may deem just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished BY U.S. Mail to: WILLIAM CONGDON, ESQUIRE, St. Johns River Water Management District, Post Office Box 1429, Palatka, Florida 32178-1429, Florida 32802-2828 this 5th day of March, 1997.

Leffler & Associates, P.A.
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W. State Road 434, Suite 317
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EXHIBIT B

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT
REGULATORY MEETING
HIGHWAY 100 WEST
PALATKA, FLORIDA 32178

May 10, 1994
2:45 p.m.
Items 126 and 127
Application by Coy Koontz

Members of Governing Board present:

PATRICIA T. HARDEN, Chairman
LENORE McCULLAGH, Vice Chairman
WILLIAM SEGAL, Secretary
REID HUGHES
JOE E. HILL
JAMES H. WILLIAMS
DENISE M. PRESCOD

Members of Staff present:

KATHRYN MENNELLA, General Counsel
TONY COTTER
LIZ JOHNSON
JEFF ELLEDGE
CHRIS SWEAZY
HAL WILKENING
JOHN WEHLE
HENRY DEAN
CHARLES MYERS

ALSO PRESENT: Bill Fogle, for Applicant
Coy Koontz, Applicant

REPORTED BY: Mary K. Shotts, RPR, Deputy Official Court Reporter

May 11, 1994 2:45 p.m.

MR. ELLEDGE: Getting back to the regulatory agenda, items 126 and 127, they are found in the addendum. This is an application by Coy Koontz to construct a commercial development in the Econlockhatchee Basin. The project involves the filling of 3.4 acres of wetlands and .3 acres of uplands in the Riparian Habitat Protection Zone of the Econ River System for commercial development. We are recommending denial of this permit application for reasons that I will state. First, I'd like to show you pretty much where this property site is in terms of the basin. You can see it's on State Road 50 just east of the eastern extension of the East-West expressway. The Econlockhatchee River is where on this, Liz? Can you put your finger on where the river runs?

MS. JOHNSON: It joins up with the Econ over here, over here in the corner.

MR. ELLEDGE: And this is a little tributary to the Econ. This is on State Road 50 and it's east of the East-West Expressway. Next, Liz. The project site consists of both forested and herbaceous uplands and forested and herbaceous wetlands.

The green cross-hatched area is wetlands, all in the Riparian Habitat Protection Zone of the Econ. The area at the upper part of the drawing, that's got the black cross-hatching, is the area proposed to be developed. The read and blue areas are uplands. The red is uplands that are within the Riparian Habitat Protection Zone and the blue areas are other uplands. As you can see, they're proposing to develop

approximately 3.7 acres, I believe, there towards the upper part of the drawing. And the little roadway is actually a cul-de-sac that runs off of State Road 50. This property does not front directly on state Road 50. It fronts on this little access road. Thanks, Liz. In reviewing this project against our permanent criteria we've got both the MSSW and the dredge and fill permits here. Both of our rules address wetland impasse. The surface water permitting rule requires that applicants demonstrate that their proposed surface water management system will not adversely effect the functions that wetlands provide to fish and wildlife.

In the dredge and fill rule there is a seven part public interest test. One of those public interest criteria is that the projects will not adversely—well, addresses the conversation of fish and wildlife. In reviewing this project we found that the project is going to result in the loss of 3.4 acres of wetlands and also some adjacent .3 of an acre of upland that are RHPZ. This will adversely effect the conservation fish and wildlife of the Econlockhatchee Basin and will adversely affect the functions that wetlands provide for fish and wildlife.

In addition, in the dredge and fill criteria we found that it will adversely affect the condition of these wetlands and their ability to—it will adversely affect the functions being performed by these areas in the current condition of these functions. Therefore, the project without mitigation does not meet our permanent criteria. The applicant proposes mitigation to preserve the remaining part of this parcel, the Southern part of the parcel, which is approximately

nine—is it 9.2 acres of wetlands and the adjacent uplands, a little over 10 acres total.

The staff in reviewing this mitigation plan has found that it does not offset the loss of functions provided by the 3.7 acres that are being developed.

Now, you can put up the next. We have suggested to the applicant ways for this project to possibly meet the criteria and I'd like to go through and discuss a couple of those. The on-site mitigation does not meet the rule requirements. We would suggest that development of up to .7 of an acre of the wetlands and .3 of an acre of the uplands at the northern part of the parcel could be accomplished and meet our criteria with the preservation of the remaining portion of the parcel of mitigation. That's one option for permitting this project.

Other options for permitting would all include off-site mitigation. We've got a couple of examples of parcels in which off-site mitigation could occur. The first parcel is the Hal Scott Preserve. This is a district owned piece of property on the Econlockhatchee River in Orange County. This shows you the relationship of this parcel to the proposed project site. It's approximately four, four and a half miles southeast of the project site. There are on the Hal Scott Preserve some existing roadways on which culverts have been crushed and become ineffective. The replacement of these culverts could enhance the hydrology in the systems and provide some enhancement of the wetlands and uplands on the Hal Scott parcel.

The next alternative is on the Demetree property. This shows you the relationship of the Demetree property to the project site. Again, it's north, northeast

of this project site approximately six or seven miles away, several miles north, northeast and I believe the Demetree property is in Seminole County.

In any event, in the Demetree property there are existing ditches that connect the wetlands and adversely—we believe they adversely affect the hydrological condition of those wetlands. These ditches could possibly be plugged or otherwise restricted to restore the hydrology of the wetlands system. We would recommend that if there were an off-site mitigation plan developed and proposed for this site that it resulted in the enhancement of 50 acres or more of wetlands that that could in addition to the preservation that the applicant has proposed be adequate to offset the impacts of this proposed project and could make this project permitable.

We just wanted to make it clear to the Board that we have looked at alternatives for this project site. There are ways that the project could become permitable with adequate mitigation or by reducing the impact on the project site or some condition of those two.

We have informed the applicant of some of these alternatives. The applicant has not responded in writing as required by the dredge and fill rule of whether or not they would implement any of these alternatives.

I have Liz Johnson here who is the ES reviewer in this project, if you have any questions of her.

Pat also is here and Kathryn Mennella and Tony Cotter have worked on the staff report as well, if you have any questions of them or myself. We have the applicant here. The applicant's agent Bill Fogle is here

to address the Board as well. Are there any questions of the staff? Yes.

MR. SEGAL: Mitigation options that you have offered, you have any idea what the costs are?

MR. ELLEDGE: No. We have not prepared an estimate of the cost on these sites. I think it would be very minimal. We're talking about putting some culverts in, a roadway on one property and flooding some ditches on the other side. It would be very minimal cost. Those would have been coordinated with the district and would be subject to your approval since those are district lands. But we've tried to find some options that we thought were practicable for the applicant to perform and we feel that they would be practicable.

MS. HARDEN: Okay. No more,questions at the moment. Mr. Bill Fogle requested to speak.

MR. FOGLE: Good afternoon. My name is Bill Fogle, and I'm a civil engineer, president of Civil Design Group in Orlando, Florida. Address is 401 South Rosalind Avenue, Suite 200. I've been retained by Mr. Coy Koontz to represent him both in the dredge and fill permit and service water management permit application before the Board.

This site is probably the most restricted site and most regulated site acreage-wise that I've ever run across in 23 years of doing business in the state of Florida. A little example of the property in question is aerial photograph—I'll pass it around so you can get a better look—outlines the parcel in question. Approximately 80 to 85 percent of the site over the years has had increasing wetland regulations.

The owner purchased the property in 1971 with no environmental regulations. At the time he had full use of the property. The advent of the initial wetland regulations followed by the adoption of the Warren Henderson Act, followed by the adoption of the Econ rule which has put approximately 80 to 85 percent of the property regulated from any use.

The owner is not a commercial developer. He's not trying to be a commercial developer. He's been trying to sell this property for the last five years that I know about. The only way we can make this a viable piece of land that he can put on the market and sell is to try and reclaim a portion of his property out of the wetlands.

The portion of the property that we're trying to reclaim is an area that lies north of an existing powerline easement between Highway 50 and the powerline easement. If you take a look on the ecosystems the whole system out here has been fractured. We have Highway 50 cuts it and we have the extension of the East-West expressway cuts it and we have a powerline cut through it. We've got a 25-foot wide canal going through it, a 10 by 10 box culvert dumping water down the ditch on the west side of the property. This whole area has been extremely fractured over the years.

The advent of the additional regulations have made any use of this property outside of the funded wetlands absolutely impossible. The only hope this property owner has is to try and reclaim a portion of the property to do that we've instigated the dredge and fill permit application to raise a portion of this land above the several feet above existing ground to pull it out of the high ground water table that constitutes and

supports the wetland vegetation that's on-site. This area is a 100 percent out of 100. Your flood plain that we're dealing with says there's not a flood plain issued involved in our proposal.

Again, we have approved developments called University Meadows and Huckleberry that both south and west property lines that again fracture the ecosystem. So let me go ahead and pass this around where you can take a little closer look at what we're talking about, and please pay a little attention to how fractured that ecosystem is that we're dealing with.

We have a another chart that basically shows the upland portions of the site which are in the orange and green similar to the exhibit that you had up there. The cross-hatched area we have in here is an existing powerline that's mowed once or twice a month so that vegetations been eliminated. We have a large ditch along the west property line. We've had increased runoff from the north, from the south, from the east that has all affected and damaged this property.

Again, the remaining lands that we in 1971 had 100 percent usable property, now basically this is the only thing that he can get to without building a quarter of a million dollar crossing of the wetland to get to approximately one acre he has in the corner.

He's been effectively right now regulated out of any use of his property. He's come back and said, okay, what can we do? Our first attempt is to try and reclaim all the land above the 100-year flood plain north of a natural slough that runs through this location.

After preliminary meetings with the water management district, we agreed to move to minimize

the impact. We pulled it north of the powerline that basically cuts this ecosystem and isolates this area already. In order to mitigate this damage, the owner has agreed to dedicate a conservation easement over 11 and a half acres of the remaining piece of his property. Mitigation scheme would take forever any development potential off the bulk of this property in order to gain some rights to develop the front portion of this property that's adjacent to a frontage road that was built as part of the East-West Expressway construction.

The staff is basically recommending denial of this for three reasons. One, it's a refusal by the owner to reduce wetland impacts or to increase offered mitigation. How much do you want? He's giving up approximately two-thirds of this property and the most environmentally sensitive portions of this property to mitigate 3.4. That's a almost four to one mitigation ratio that he's offered in this application.

He's not—he's an elderly gentleman. He needs to sell the property, and we're trying to get enough that he can reclaim his investment in this property. This is as close to a complete regulatory taking case as I've ever seen. And the mitigation that he's given is phenomenal. He's given **up** two-thirds of his land in order to reclaim a says two-thirds of your property's not enough, so you have to go off-site with 50 acres of additional enhancement. That's ludicrous folks. That's almost a 15 to 20 mitigation ratio that the state's looking for distressed fractured system.

The second one was adverse impact to wetlands habitat. Folks, this site has no wetland habitat at all, has no benefit. It's fractured. It's cut. It's surrounded by pavement and it's surrounded by proposed and permitted development. There are no wildlife benefits

on this site. And how the staff can say that we're damaging wildlife benefits with what's already gone in this area is beyond my comprehension.

The third one is we haven't provided reasonable assurances the project would not create a cumulative impact. Again, your cumulative impact criteria is relatively new. I don't understand it 100 percent. But if somebody's willing to preserve two-thirds of their site and perpetuate it forever to be allowed to try to reclaim the property, we thought was an absolute excellent proposal and should have been reviewed and accepted by the staff.

We don't agree with your staff's environmental evaluation on the wildlife habitat potential at the site. We don't agree with their request for additional mitigation in order to be permitted. We've had a client that's owned the property for 23 years, been damaged for years. Every regulation that's been adopted has taken another piece of his property and another piece of his development rights. It's gotten to the point that you've taken it all, and this is basically his last attempt to try and work within the system in order to reclaim a portion of his property and reclaim his investment in his land. Any questions?

MR. SEGAL: I'm somewhat familiar with that piece of property to the north of it abiding Highway 50. Isn't that area fenced off? Like, didn't the DOT kind of extend the fence there from an off ramp of the expressway?

MR. FOGLE: A portion of it's fenced, most of it's not. The road immediately north is Bonneville Drive and the development immediately north is the research

park. A portion of the limited access right-of-way is fenced.

MR. SEGAL: Is this kind of a window to Highway 50?

MR. FOGLE: Absolutely. The frontage road has been constructed to the intersection of Bonneville Drive. When the DOT bought limited access right-of-way, they cut off its frontage and they had to build an access road or frontage road to give this property and the property over here access to Highway 50 or they would have had to buy the property back then.

MR. SEGAL: But he was somewhat compensated for that loss?

MR. FOGLE: Of course, but not for the entire piece of property obviously.

MR. HILL: What's the condition of the wetlands that you plan to give to the conservation easement? Is it just another distressed wetland also?

MR. FOGLE: Again, if you take a look at that area, you will find a strip of wetlands that follows the creek line. It's a little bit more distinguishable maybe on this area.

MR. HILL: You talking about here or over here?

MR. FOGLE: If you can take a look, you can see a strand of vegetation comes through here. That is your classic wetlands. Everything above that or beyond that is a mixed bag of upland and wetland vegetation. What you need to preserve from a wetland standpoint is this strand. We're not proposing to take that.

The rest of the wetlands, especially this stuff north of that powerline is extremely distressed, limited habitat value. We've been in disagreement with staff on the—almost from the getgo on the value of this for wildlife and fish. We don't see it. My environmentalist, Jim Morgan of Morgan Environmental, done extensive reviews on-site and basically sees no current benefit to fish or wildlife on this property at all.

MR. HUGHES: I think basically you're challenging staff's findings of fact.

MR. FOGLE: Absolutely.

MR. HUGHES: Now, do you have material today to support your verbal allegations—

MR. FOGLE: Sure. We've submitted enough environmental reports in our application to support our position. Again, when you take a look at your rules, there are no rules, there are specific facts involved with what is a cumulative impact we've seen, what is a viable wetland habitat. Those things are mostly what is your opinion of that matter. I've got opinions both my own and our environmentalist that it's not a good habitat. We have opinions on the water management district that they are. There is nothing that says, hey, it's number two class wetland with this kind of species and it classifies it as good or bad. It's a subjective matter that we're looking at.

MR. HUGHES: Well, I believe we're talking about objective things here when we're talking about wetlands, mitigation and so forth. Now, you've presented to our staff people your findings from your environmental people and they reviewed these; this is what you're saying?

MR. FOGLE: Absolutely.

MR. HUGHES: They disagreed with the factual information that you gave our staff people—

MR. FOGLE: Sure.

MR. HUGHES:—is that where we are?

MR. FOGLE: Again, it comes down to a difference of opinion on the quality of that wetland. Again, I'm trying to demonstrate in relatively simple terms that I've got an expressway on this side, a major road on this side, a powerline cutting through here, two developments on two sides of me, and what you've got is a narrow band of wetlands surrounded by development. And I'm being told that that's a significant wildlife habitat benefit and that my construction of 3.4 acres of fill on the north part of my property north of the powerline is going to do damage to the wildlife. Our expert said no way. There are no wildlife benefits to begin with, let alone loose on this property.

MS. HARDEN: Can we hear staff's response, please?

MR. ELLEDGE: The staff report spells out wildlife benefits that we see in the wetlands. The staff considers these wetlands to be a high quality wetlands and uplands in the Riparian Habitat Protection Zone of the Econ, which again impact in these areas are presumed to be harmful, unless the applicant demonstrates—demonstrates otherwise, it's presumed to be harmful to the fish and wildlife.

The—not only—I also wanted to point out this powerline itself is not the type of powerline where you have a road underneath it. That powerline has

actually a herbaceous wetland system underneath the powerline. It's not a forested wetland that's been cleared obviously, but it still is a wetland herbaceous system in that area.

As to what the applicant consultant submitted, Liz, did their consultant submit information that there is no habitat value at all to this wetland system? Did you get any such report, any surveys or other information that demonstrated that? What did you do get?

MS. JOHNSON: They did submit a wildlife survey of the area and there were a variety of birds and other different types of wildlife using the area that was surveyed and they surveyed the whole site.

MR. ELLEDGE: So I think it's safe to say there's a disagreement regarding the quality of the wetland system. The staff believes that this system is of high quality. I think there's also a disagreement as to whether or not we have totally prevented the use of this property. As I indicated earlier, development of up to an acre of this property could be mitigated on-site and development of 3.7 acres as proposed could be—could be accomplished if off-site mitigation were also included in the mitigation plan.

MR. FOGLE: Again, you do have a significant mitigation plan already included in this proposal. The man's given 11 and a half acres of wetlands preserved from development. That is—I don't know whether staff agrees with it or not, but that is a tremendous financial benefit to the State, preservation of the ecosystem to how much can you do.

We've taken a look at the economics of this situation. The owner paid top dollar for this property

back in 1971. He's held it for years, and he's had 80 percent of his property regulated away today and he has to come before a board and say, look, I want to reclaim 3.4 acres of my property so I can get my economic benefit back out of that property. And we're looking at a system. All you got to do is look at the aerial photographs, see the road systems, powerlines and developments that have been proposed here, and to say that it's—a viable wildlife system is ridiculous. I don't know care what expert looks at it, what staff reported.

We've got a severe disagreement on intent with staff's evaluation on this track. And again, we understand that we have to do mitigation, but my God, how much more do you folks want? The owner has taken this thing out, but he can't—can't afford to go off-site to mitigate anything else. It's expensive enough for him to reclaim under dredge and fill permit the 3.4 acres, and if he does get that and he gets commercial values at today's rate, he's barely out of that recouping his initial investment.

MS. HARDEN: As I understand this, your client doesn't want to build anything, he just wants to clear it and fill it to make it saleable; that's what you're saying?

MR. FOGLE: The only way he can sell that property is to get around the wetland regulations. The easiest way we found to do that is to get a dredge and fill permit issued. He has no intent to sell it to do a commercial development. It is commercially zoned property, and hopefully he will sell it to somebody who will do a commercial development on the 3.4 acres. But he himself is just trying to sell the property, has been for five years, been unsuccessful because of the

wetland impacts and regulations that have been placed on this property.

MR. HILL: What kind of development do you think might go in there? What's that zoned for?

MR. FOGLE: It's a commercial zone. It's on 50 at an intersection, at a major interstate highway, 7-11, McDonald's, you know, Jiffy Lube, a little strip center, there's a lot of possibilities.

MR. HILL: Isn't there a junkyard right down the road or maybe it's a parts place?

MR. FOGLE: No, sir.

MR. HILL: I laid a 42-inch pipeline under that string you're talking about one time years ago before they had the expressway.

MR. FOGLE: They just designed a 120-foot bridge to go over the adjacent piece of property, so times they are changing.

MR. HUGHES: We're not in the economic business. We're considering this environmentally and scientifically, but I'm just curious when you bought it back in 1971, what was the zone?

MR. FOGLE: What was the zone in '71?

MR. KOONTZ: Same zoning.

MR. FOGLE: Same zoning, commercial-in the front and R2 in the back.

MS. HARDEN: Ms. Prescod's been waiting.

MS. PRESCOD: On that map that you have, yeah, of the yellow and green portion that you want to develop up there, what is the size of that?

MR. FOGLE: This is .42 acres of upland of which that includes the Riparian setback zone that's adopted with the Econ rule and we have 3.13 acres of the wetland, defined wetland, of which about an acre of that is already a cleared, mowed powerline easement, totally stripped of vegetation.

MS. PRESCOD: And staff proposed a dry bottom retention in there and I understand your people rejected it. Could you give me some idea of why?

MR. FOGLE: This is a dry bottom retention pond in the powerline easement as shown. One of the staff's recommendations that we got at 5:30 Monday night was the only time that we seen staff's recommendation for off-site mitigation, was to well, eliminate this and put some underground storage up site.

Those underground infiltration systems for this kind of site development probably would run to the tune of about 180, $200,000, not economically feasible for a tract this small with Ian . . . at this base price. And again what we're proposing was to use already cleared, massively disturbed areas in here for storing water retention. And it is a dry pond that is designed, very shallow storage departments.

MR. HILL: If you just got this information at 5:00 on Monday, would you be willing to go back with the staff over the next month and renegotiate this thing and try to come up with.

MR. FOGLE: I've discussed that with the owner. Basically what we think we presented is more than an adequate mitigation plan. The owner is not interested in looking to do any additional off-site mitigation to try and resolve this. He's given up two-thirds of his property.

MR. HILL: Well, I just asked a question.

MR. FOGLE: And he's given up the best and most significant wetlands on that property for preservation from here on out. The mitigation ratios that staff are asking for dealing with what we consider reclaiming here are excessive in our argument.

MR. HILL: But you prefer to have this permit turned down than to try for 30 more days?

MR. FOGLE: Again, my client has undergone bypass surgery. He needs to get out of town to rest and recuperate, and hopefully would like to resolve this matter with the board today.

MR. HUGHES: I have another. Would you say that—this was taken in 1990, this photograph. It shows a ground-covering vegetation and trees and so forth in 1990. Since that time you're alleging - and I haven't been on the site, but you're stating that these trees have been stripped and no longer in the condition this photograph shows; is that correct?

MR. FOGLE: If you take a look at the powerline easement, it bisects the site that has been stripped. It has been stripped for a number of years. The rest of the site has been natural vegetation since 1971.

MR. HUGHES: In other words, the site is still in the condition that the photograph here showed, I mean?

MR. FOGLE: Yes, sir.

MR. HUGHES: Well, there's considerable tree cover apparently from looking at this, and you're stating it's stripped?

MR. FOGLE: I'm stating that the powerline that runs through the center of the site a hundred feet in width has been stripped of all the vegetation and is basically mowed grass and mowed wetland vegetation.

MR. HUGHES: Well, that's a very minor part of it, would you say?

MR. FOGLE: Again, what we're trying to reclaim is a minor portion of it north of that powerline, totally isolated from the rest of the wetland system.

MS. PRESCOD: I think my colleague is speaking about the apartments and so on that you mentioned—

MR. FOGLE: Again, Huckleberry development approved to the south, they are proceeding with the development. They have approved the conceptual search, the water permit's issued. And the adjacent development, University Meadows is a permitted development up through phase one construction that has not started yet, but it is permitted and is anticipated.

MS. HARDEN: Mr. Segal.

MR. SEGAL: Yeah. I'm sensitive to your client's loss that he has suffered due to increasing regulatory pressure since 1971. I've had a similar problem, and it's no fun, but that's the facts of life. And I keep hearing you suggest that he's already giving up two-thirds of his property in the back as mitigation, but apparently what I'm hearing the staff say he's already lost that due to regulation, and I just want to clarify that one thing.

MR. FOGLE: I'd love you to put that same statement to the court reporter. I'd love it. He's lost it

to regulation, by God, the State should compensate him for it.

MR. HILL: My point—I don't want to cut it short. They don't want to wait 30 days to try to work it out, go over and get a bulldozer, fill up a few ditches as mitigation off-site. They want to go to court. If he got a lawyer, they ought to get him, get on with it. I move the staff recommendation.

MR. HUGHES: I second the motion. I second the motion.

MS. HARDEN: Motion's been moved and seconded. Is there any further board discussion?

MR. SEGAL: It doesn't appear that the mitigation of the staff is asking for what amounts to too much—too much money in view of—

MR. FOGLE: Well, how about having your staff tell us? I mean, there's nothing we'd love today than to get 3.4 acres, keep this thing out of court and go our happy ways, let our owner recoup his investment, sell his property. I've done probably as much enhancement mitigation permitting through the district. Our costs are typically around $20,000 an acre for enhancement on the four or five projects I've worked on. I have no idea what the staff's filling a couple of ditches in, but I've never worked on one that's been that simple. You ask your staff what the cost? They don't have an idea. My owner spent—is willing to give up a million dollars' worth of potentially commercial property for mitigation. It's phenomenal and it's not enough.

MS. HARDEN: Thank you.

MR. HUGHES: Let me ask him one last question from me. We've gone over the same thing over and

over again. We're asking the same questions. You're giving the same answers, presenting the same information. Do you have anything new to present?

MR. FOGLE: No.

MR. HUGHES: I'd like to hear anything new you got, otherwise I'm ready to vote.

MR. FOGLE: Fine.

MR. HILL: I'm going to ask you one-more time. Would you prefer this permit be turned down; is that what you want or would you like to work for 30 days and try to work it out and see if these minimum costs they're talking about, see if you can afford that?

MR. FOGLE: I've got specific instructions from my client that the offer is as good as it can get. It's an excellent offer, an excellent mitigation plan to reclaim the preserved areas. We were hoping that we would get at least some consideration, not just saying, hey, we own it already, go out and do something else in order to get a permit.

Understand that this mitigation plan is a substantial benefit to the State with substantial preservation of a significant portion of wetlands for the State, and to throw it off and say now go do something else is pushing the envelope.

MS. HARDEN: Thank you. Is there—

MR. ELLEDGE: I—Madam Chairman, I wanted to make a comment for the record before the vote in response to some of the comments made by Mr. Fogle. This application, the dredge and fill application, you're required to take action on that today because the applicant invoked a rule provision which allows them

to declare the application complete—essentially to require action without considering any—providing anymore information. So they have basically forced us to take action today, and as part of our responsibility in reviewing these permits, we have provided them with options and alternatives.

Based on the time that we've had, some of these proposals were made recently, as Monday perhaps, although I felt we had actually called and given some of these last week. Oh, that's right. You were out of town last week, but it was early this week we provided them with some of these alternatives.

They are required by the dredge and fill rule to provide written responses to whether or not those alternatives are practicable. It's therefore their responsibility to make this analysis on whether or not they have a practicable alternative. We believe that their practicable plugging the ditches or they're putting culverts in in rows on this other parcel would be very economical approaches towards mitigation. The other thing I wanted to state is that we do not believe that the mitigation has been proposed by the applicant is acceptable. We don't beiieve that it fulfills the requirements of the rule. Essentially it allows the loss of one acre of wetland for the preservation of three, a three to one ratio. If you did that on every parcel of property that was proposed for development the state would lose 25 percent of its wetlands and that would be an unacceptable cumulative loss of wetlands.

MR. FOGLE: Again—

MS. HARDEN: Excuse me. You're out of order, sir.

MR. ELLEDGE: Excuse me, sir. Especially since we've already lost half of the wetlands of this state to

development of one type or another. So that was the basis for our recommendation. I did want to make a couple explanatory comments based on comments that have been made. If there are any other questions, we'll be happy to answer them.

MS. HARDEN: Are there any other questions? All in favor of the motion? (All board members responded by saying "aye.")

MS. HARDEN: Opposed? Motion carried.

(End of proceedings)

EXHIBIT C

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

IN RE:

COY A. KOONTZ WETLAND RESOURCE MANAGEMENT PERMIT APPLICATION NO. 12-095-0109A ORANGE COUNTY, FLORIDA	))))))))	FILED Jun. 9, 1994 F.O.R. 94-1498

FINAL ORDER

THIS MATTER came before the Governing Board of this St. Johns River Water Management District ("District") on May 11, 1994. The Governing Board, having been fully advised o the facts by the applicant and the District staff, hereby enters the following findings of fact and conclusions of law and order.

FINDINGS OF FACT

1. Applicant, Coy A. Koontz ("Koontz"), applied to the District for a wetland resource managment ("WRM") permit under Chapter 17-312, Fla. Admin. Code, to authorize the dredging and filling of 3.4 acres of wetlands for the construction of an unspecified commercial development and a dry-bottom retention/detention basin with a side-bank filterdrain on a 14.9 acres project site.

2. The Koontz property is located within the Econlockhatchee River Huydrologic Basin in Section 23, Township 22 South, Range 31 East in eastern

Orange County, Florida (the "Property"). More particularly, the Property is located south of State Road ("S.R.") 50 just east of the Eastern Extension of the East-West Expressway.

3. The Property lies almost entirely within the Riparian Habitat Protection Zone ("RHPS") of the Econlockhatchee River Hydrologic Basin designated by District rules 40C-4.041(2)(b)9. and 40C-41.063(5)(d)1., Fla. Admin. Code. The northernmost part of the Property consists of 1.3 acres of uplands; 0.5 acres of non-RHPZ uplands and 0.8 acre of RHPZ uplands. In the northernmost part of the Property a paved road accounts for 0.4 acre of RHPZ uplands and a grassy right-of-way accounts for 0.5 acre of non-RHPZ uplands. On the Property just ot the south of the upland area is approximately 11.8 acres of forested and herbaceous wetland area bisected by a tributary to the Econlockhatchee River. In the southeastern corner of the property lies 1.8 acres of forested uplands: 0.6 acre is PHPZ upland and 1.2 acres is non-RHPZ upland.

4. The 2.2 acres of forested uplands are vegetated with mature canopy of long leaf pine with an understory of saw palmetto. The onsite wetlands consist of a diverse mixture of plant communities 10.9 acres of mature forested wetlands and 0.9 acre of herbaceous wetlands. The wetlands at the higher elevations consist of a seepage slope area vegetated with pond pine and loblolly bay trees with a dense understory of saw palmetto. As the elevation decrease, a herbaceous wetland area is located within an existing power line easement. Historically, the wetland area within the power line easement was deforested. The power company maintains the wetland area within the power line easement as a herbaceous wetland. The

plant community within the powerline easement includes red root, rush fuirena, guinea grass, saw grass and red top opanicum. The wetlands located at the lowest elevation consist of a mixed hardwood system with a mature canopy of loblolly bay, red maple, southern magnolia, laurel oak, water oak, and dahoon holly.

5. The forested and herbaceous wetlands on the Property are of high quality.

6. The different wetland communities on the Property provide a diversity of habitat and food sources, and serve as an important refuge for a variety of wildlife species within this area of the Econlockhatchee River Hydrologic Basin. The resting, breeding, foraging and nesting requirements of many wildlife species are met in these wetlands.

7. Koontz's proposed project includes the construction of a commercial building site and dry-bottom retention/detention system. A total of 3.4 acres of wetlands consisting of the entire seepage slope zone and herbaceous wetland zone and a narrow strip of the mixed hardwood zone are proposed to be filled for the construction of a dry-bottom retention/detention basin and parking area for the commercial development.

8. Koontz's proposed development will displace wildlife habitat and cause adverse impacts to fish and other wildlife species.

9. Koontz proposed to place the remaining 9.2 acres of uplands and wetlands within the RHPZ and the 1.2 acres of uplands adjacent to the RHPZ in a conservation easement to offset the proposed loss of functions currently provided by the 3.4 acres of wetlands to wildlife.

10. The District suggested several practicable design modifications to Koontz to reduce the wetland impacts of the proposed project to such an extent that the fish and wildlife impacts could be eliminated or sufficiently reduced with appropriate mitigation to be permitted under District rules, provided Koontz's proposed plan also complied with the relevant water quantity and water quality criteria. A possible design modification offered by the District which would reduce the clearing or filling within the wetlands involved the construction of a subsurface stormwater management system under the commercial development site, thereby eliminating the construction of the dry-bottom retention/detention pond. The District also suggested that Koontz reduce wetland impacts through the elimination of side-slope areas and replacing these with stem walls.

11. Prior to the Governing Board's consideration of the application on May 1, 1994, Koontz did not contest the practicability of the design modifications for achieving a permittable development from the District, but declined to acept the suggested practicable design modifications. Koontz never responded in writing to the District's suggested design modifications.

12. At the Govening Board hearing Koontz's agent, Mr. William Fogle, argued that the subsurface stormwater treatment system alternative would be too constly. However, Mr. Fogel did not provide any evidence or analysis to substantiate this claim.

13. The District also suggested to Koontz several off-site alternatives to onsite mitigation, including restoration, enhancement and preservation. In the District's Technical Staff Report provided to Koontz on

May 9, 1994, the District discussed two off-site mitigation enhancement options available on District-owned properties (the Hal Scott Preserve and the Demetree Property) within the Econlockhatchee River Hydrologic Basin.

14. Within wetlands in the Hal Scott Preserve existing road systems require the replacement of approximately fifteen inoperative or abandoned culverts. Replacement of the culverts would enhance the wetland functions to wildlife in the Preserve by maintaining the hydrologic capability of the wetland systema nd would eliminate any existing or potential sedimentation problems. Additionally, there are several ditches constructed in uplands within the Prserve that hydrologically and vegetatively connect the isolated wetlands to the Econlockhatchee River. These ditches have altered the natural hydroperiod of the wetlands. Plugging or eliminating the ditch system would help rehydrate all or some of the affected wetland systems and, therefore, enhance the wetland functions to wildlife in the Econlockhatchee River Hydrologic Basin.

15. Another off-site mitigation enhancement option is available on the Demetree property. On this property a series of ranch ditches in uplands connect several wetlands. The ditch system discharges directly into the Econlockhatchee River and continues to alter natural hydroperiod of the wetland systems. Plugging or eliminating the ditch system would aid in rehydrating all or some of the affected wetland systems, and therefore, enhance the wetland functions to wildlife in the Econlockhatchee River Hydrologic Basin.

16. Implementation of one or more of these off-site mitigation alternatives could offset the proposed impacts on the property and make the development, as proposed, permittable.

17. District staff indicated that if Koontz supplemented its on-site mitigation plan with an off-site enhancement mitigaytion option which included a total of at least 50 acres of wetland enhancement on either of the two suggested example sites, such an approach would sufficiently mitigate for the impacts proposed in Koontz's WRM permit application. A combination of enhancement activities on both of these example sites totalling at least 50 acres of wetland enhancement would also be acceptable.

18. Equivalent off-site mitiation enhancement options on other properties within the basin could also be developed and proposed by Koontz.

19. As another option, the District suggested to Koontz that his commercial development be reduced to a scale that would enable Koontz's proposed onsite mitigation plan to sufficiently offset project impacts. Specifically, Koontz could develop 0.7 acre of wetlands and 0.3 acre of uplands within the RHPZ for commercial development fronting S.R. 50 wth mitigation for the wetland and upland impacts in the form of a conservation easement or deed restriction consistent with Section 704.06, Florida Statues, over the remaining undeveloped wetlands and uplands excluding the 0.4 acre portion of the paved road within the RHPZ and the 0.5 acre portion of right-of-way on the Property.

20. Property with similar configuration characteristics, as well as similar or shared wetland

systems, occur within the same drainage basin of the proposed project.

CONCLUSIONS OF LAW

21. The District has jurisdiction over Koontz's proposed project. Section 373.069(2)(c), Fla. Stat.; Chapters 17-113 and 17-312, Fla. Admin. Code.

22. To obtain an WRM permit from the District, it is Koontz's burden to provide reasonable assurance thte the proposed project is not contrary to the public interest. Rule 17-312.080(2) Fla. Admin.Code.

23. The seven criteria fo the public interest test are set forth below:

> Whether the project will adversely affect the public health, safety, or welfare of the property of others.
>
> Whether the project will adversely affect the conservation of fish and wildlife, including endangered or theratened species or their habitats.
>
> Whether the project will adversely affect navigation or the flow of water or cause harmful shoaling.
>
> Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project.
>
> Whether the project will be of a temporary or permanent nature.
>
> Whether the project will adversely affect or enhance significant historical and archeological resources under the provisions of Section 267.061, Florida Statutes.

> The current condition and relative value of functions being performed by areas affected by the proposed activity.

Sections 373.418(2), Fla. Stat. (1993) and 403.918(2)(a), Fla. Stat. (1991); Rule 17-312.080(2), Fla. Admin. Code.

24. Koontz failed to provide reasonable assurance that the proposed project which, if constructed, would displace natural wildlife habitat, cause adverse impacts to the conservation of fish and wildlife, and would adversely affect the current condition and relative value of the functions being performed by the wetlands, is not contrary to the public interest. Rule 17-312.080(2), Fla. Admin. Code.

25. Measuring the proposed project with the Public interest criteria indicates, that without an adequate mitigation plan, the proposed project is contrary to the public interest. Rule 17-312.080(2), Fla. Admin. Code.

26. In failing to respond in writing to the district as to whether or not the identified modification to the proposed project is practicable and whether he would make the identified modification, Koontz failed to comply with Rule 17-312.060(10), Fla. Admin. Code.

27. Koontz failed to provide reasonable assurance that the proposed project when considered with projects which may reasonably be expected to be located within the jurisdictional extent of waters, would not result in unacceptable cumulative impacts upon wetland functions. Rule 17-312.060(10), Fla. Admin. Code.

28. Eased on the high quality of the wetlands and the impacts proposed to these areas, the on-site mitigation plan proposed by Koontz is inadequate, and therefore the proposed Project fails to meet the requirements of Rules 17-312.080(2) and 17-312.340, Fla. Admin. Code.

29. Accordingly, the project does not comply with rules 17-312.00(10), 17-312.080(2), and 17-312.340, Fla. Admin Code.

WHEREFORE, upon consideration, it is ORDERED that the WRM Application No. 12-095-0109A of Coy A. Koontz is DENIED.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

/s/PATRICIA T. HARDEN
BY: PATRICIA T. HARDEN,
Chair Governing Board

RENDERED this 9th day of June, 1994, in Palatka, Florida.

/s/PATRICIA C. SCHULTZ
PATRICIA C. SCHULTZ
District Clerk

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of the rendering of the final District action.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla. R. App. P. 9.110 within 30 days of the rendering of the final District action.

3. A party to the proceeding who claims that a District order is inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Regulation and any person named in the order within 20 days of the rendering of the District order. However, if the order to be reviewed is determined by the Commission within 60 days after receipt of request for review to be of statewide or regional significance, the Commission may accept a request for review within 30 days of the rendering of the order.

4. A District action or order is considered "rendered" after it is signed by the Chairman of the

Governing Board on behalf of the District and is filed by the District Clerk.

5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 and #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

COY A. KOONTZ
120 ENSENADA DRIVE
ORLANDO FL 32825

at 4:00 PM this 9TH day of JUNE, 1994.

/s/PATRICIA C. SCHULTZ
PATRICIA C. SCHULTZ
DISTRICT CLERK
St. Johns River Water
Management District

CERTIFIED MAIL # P 337 543 247

EXHIBIT D

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

IN RE:

COY A. KOONTZ WETLAND RESOURCE MANAGEMENT PERMIT APPLICATION NO. 12-095-0109A ORANGE COUNTY, FLORIDA	))))))))	F.O.R. 94-1499

FINAL ORDER

THIS MATTER came before the Governing Board of this St. Johns River Water Management District ("District") on May 11, 1994. The Governing Board, having been fully advised of the facts by the applicant and the District staff, hereby enters the following findings of fact and conclusions of law and order.

FINDINGS OF FACT

1. Applicant, Coy A. Koontz, ("Koontz"), applied to the District for a management and storage of surface waters ("MSSW") permit under Chapter 40C-4, Fla. Admin. Code, to authorize the construction and operation of a stormwater and surface water property. The proposed system includes an unspecified-commercial development and a dry-bottom retention/detention basin with a side-bank filterdrain on 3.7 acres of fill.

2. The Koontz property is located within the Econlockhatchee River Hydrologic Basin in Section 23,

Township 22 South, Range 31 East in eastern Orange County, Florida. More particularly, the property is located south of State Road ("S.R.") 50 just east of the Eastern Extension of the East-West Expressway.

3. The property lies almost entirely within the Riparian Habitat Protection Zone ("RHPZ") of the Econlockhatchee River Hydrologic Basin designated by District rules 40C-4.041(2)(b)6. and40C-41.063(5)(d), Fla. Admin. Code. The property contains approximately 13.2 acres of uplands and wetlands located within the RHPZ. Rule 40C-2 41.063(5)(d), Fla. Admin. Code. The remaining 1.7 acres of forested uplands on the property lie outside of the RHPZ.

4. The forested upland canopy on the property consists of predominantly long leaf pine with a saw palmetto understory. A small portion of the uplands within the RHPZ (approximately 0.5 acre) is maintained as a crass right-of-way for the existing paved access road. The wetland component of the property includes a tributary to the Econlockhatchee River. The onsite wetland contains a diverse Plant community: approximately 10.9 acres of mature forested wetlands and 0.9 acres herbaceous wetlands. The higher elevations of the wetlands consist of a see page slope zone vegetated with loblolly bay and pond pine. The understory primarily contains saw palmetto. As the elevation decreases, a herbaceous wetland is maintained within a powerline easement. Historically, the area within the easement was deforested. The plant community within the easement includes red root, rush fuirena, guinea crass, saw crass and red top panicum. A mixed hardwood system with a mature canopy of loblolly bay, red maple, southern

magnolia, laurel oak, water oak and dahoon holly is found at the lowest elevation of the wetland.

5. The uplands and wetlands on the Koontz property are of high quality.

6. Koontz's Property provides a diversity of habitat and food sources for a variety of wildlife species and serves as an important refuge for a variety of aquatic or wetland dependent wildlife species within the Econlockhatchee River Hydrologic Basin. The resting, breeding, foraging and nesting requirements of many aquatic or wetland dependent species, as well as other wildlife, are provided by the wetland systems.

7. Koontz's proposed system includes the construction of an unspecified commercial development building site, parking lot and dry-bottom retention/detention basin on 3.7 acres of uplands and wetlands within the RHPZ. The entire seepage slope zone and herbaceous wetland zone, a narrow strip of the mixed hardwood zone, and a portion of the longleaf pine flatwoods will be cleared and filled for development.

8. Koontz's proposed project will displace wildlife habitat and cause adverse impacts to fish and wildlife, including aquatic and wetland dependent species.

9. Koontz proposed to place the remaining undeveloped 9.2 acres of RHPZ uplands and wetlands and 1.2 acres of non-RHPZ uplands into a conservation easement as mitigation to offset the adverse impacts on the wildlife functions provided by the uplands and wetlands within the RHPZ.

10. The District suggested several alternative approaches to Koontz to reduce impacts of the proposed

project impacts to such an extent that the fish and wildlife RHPZ impacts could be eliminated or sufficiently reduced. Therefore, if the fish and wildlife RHPZ impacts are eliminated or sufficiently reduced with appropriate mitigation the proposed project may be permitted under District rules, provided Koontz's proposed plan also complied with the relevant water quantity and water quality criteria. A possible design approach offered by the District, which would reduce the clearing or filling within the RHPZ, involved the construction of a subsurface stormwater management system under the project site thereby eliminating the construction of the dry-bottom retention/detention basin. The District also suggested that Koontz reduce wetland impacts through elimination of side-slope areas and replacing these areas with stem walls.

11. Prior to the Governing Board's consideration of the permit application on May 11, 1994, Koontz did not contest the viability of the alternative approaches to achieving a permittable project from the District, and, without explanation, declined to accept the suggested alternative approaches.

12. At the Governing Board hearing, Koontz's agent, Mr. William Fogle argued that the subsurface stormwater treatment system alternative would be too costly. However, Mr. Fogle did not provide any evidence or analysis to substantiate this claim.

13. The District also suggested to Koontz several off-site alternatives to onsite mitigation, including restoration, enhancement and preservation. In the District's Technical Staff Report provided to Koontz on May 9, 1994, the District discussed two off-site mitigation enhancement options available on District-owned properties (the Hal Scott Preserve and the

Demetree Property) within the Econlockhatchee River Hydrologic Basin.

14. Within wetlands in the Hal Scott Preserve existing road systems require the replacement of approximately fifteen inoperative or abandoned culverts. Replacement of the culverts would enhance the wetland functions to wildlife in the Preserve by maintaining the hydrologic capabilities of the wetland system and would eliminate any existing or potential sedimentation problems. Additionally, there are several ditches constructed in uplands within the Preserve that hydrologically and vegetatively connect the isolated wetlands to the Econlockhatchee River. These ditches have altered the natural hydroperiod of the wetlands. Plugging or eliminating the ditch systems would help rehydrate all or some of the affected wetland systems and, therefore, enhance the wetland functions to wildlife within the Econlockhatchee River Hydrologic Basin.

15. Another off-site mitigation enhancement option is available on the Demetree property. On this property a series of ranch ditches in uplands connect several wetlands. The ditch system discharges directly into the Econlockhatchee River and continues to alter the natural hydroperiod of the wetland systems. Plugging or eliminating the ditch system would aid in rehydrating all or some of the affected wetland systems, and therefore, enhance the wetland functions to wildlife.

16. Implementation of one or more of these off-site mitigation alternatives could offset the proposed impacts on the property and make the development, as proposed, permittable.

17. District staff indicated that if Koontz supplemented its on-site mitigation plan with an off-site enhancement mitigation option which included a total of at least 50 acres of wetland enhancement on either of the two suggested example sites, such an approach would sufficiently mitigate for the impacts proposed in Koontz's MSSW application. A combination of enhancement activities on both of these example sites totalling at least 50 acres of wetland enhancement would also be acceptable.

18. Equivalent off-site mitigation enhancement options on other properties within the basin could also be developed and proposed by Koontz.

19. As another option, the District suggested to Koontz that his commercial development be reduced to a scale that would enable Koontz's proposed onsite mitigation plan to sufficiently offset project impacts. Specifically, Koontz could develop 0.7 acre of wetlands and 0.3 acre of uplands within the RHPZ for commercial development fronting S.R. 50 with mitigation for the wetland and upland impacts in the form of a conservation easement or deed restriction consistent with Section 704.06, Florida Statutes, over the remaining undeveloped wetlands and uplands excluding the 0.4 acre portion of the paved road within the RHPZ and the 0.5 acre portion of right-of-way on the property.

20. Property with similar configuration characteristics, as well as similar or shared wetland systems, occur within the same drainage basin as Koontz's property.

21. On September 8, 1993, the Governing Board approved a policy that requires a MSSW permit

applicant to provide reasonable assurance that the Proposed system will not result in cumulative unacceptable impacts upon water quality or wetland functions within the same drainage basin as the project.

CONCLUSIONS OF LAW

22. The District has jurisdiction over Koontz's proposed project. Section 373.069(2)(c), Fla. Stat.; Chanters 40C-4 and 40C-4 1, Fla. Admin. Code.

23. To obtain an MSSW permit from the District, it is Koontz's burden to provide reasonable assurance that the proposed system will comply with all conditions for issuance of the permit. Rules 40C-4.301(1)(a), 40C-4.301(2)(a), 40C-41.043(1), 40C-41.063(5)(c), 40C-41.063(5)(d)2., 40C-42.023, Fla. Admin. Code.

24. Koontz must provide reasonable assurance that wetland functions to fish and wildlife will not be adversely affected. Section 10.7.4 of the Applicant's Handbook, Management and Storage of surface Waters; Rule 40C-4.301(2)(a)7., Fla. Admin. Code.

25. Koontz must provide reasonable assurance that construction or operation of the system will not adversely affect the abundance, diversity, food sources, or habitat of acuatic or wetland dependent species. Rule 40C-4.063(5)(d), Fla. Admin. Code.

26. Any of the following activities within the RHPZ are presumed to adversely affect the abundance, food sources or habitat of aquatic or wetland dependent species provided by the RHPZ: construction of buildings, impoundments, roads, ditches, swales, and

any land clearing which results in the creation of any sstem. Rule 40C-41.063(5)(c) (d)2., Fla. Admin. Code.

27. Koontz has failed to provide reasonable assurances that the construction of his proposed system within the RHPZ of the Econlockhatchee River Hydrologic Basin will not adversely affect the functions provided to aquatic or wetland dependent species by the RHPZ. District staff provided Koontz with alternative approaches to his mitigation plan which would have adequately mitigated the adverse fish and wildlife impacts of the proposed project, but Koontz rejected these. Likewise, Koontz has failed to provide reasonable assurances that the construction and operation of the proposed system will not adversely affect the functions provided to fish and wildlife by the wetlands adjacent to the tributary to the Econlockhatchee River. Consequently, the project does not comply with rules 40C-4.301(1)(a)10., 40C-4.301(2)(a)7., 40C-41.063(5)(d)1., and 40C-41.063(5)(d)5., Fla. Admin. Code.

28. Without mitigation, Koontz has failed to provide reasonable assurance that the system, when considered with activities regulated under Part IV of Chapter 373, Fla. Stat., which may reasonably be expected to be located within wetlands and are located within the same drainage basin and which have adverse impacts like those which will be caused by the proposed project will not result in a cumulative unacceptable impact upon wetland functions.

WHEREFORE, upon consideration, it is ORDERED that the MSSW Application No. 4-095-0474A of Coy A. Koontz is DENIED.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

/s/PATRICA T. HARDEN
BY: Patricia T. Harden, Chair

RENDERED this 9th day of June, 1994, in Palatka, Florida.

/s/PATRICIA C. SCHULTZ
BY: PATRICIA C. SCHULTZ
District Clerk

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of the rendering of the final District action.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla. R. App. P. 9.110 within 30 days of the rendering of the final District action.

3. A party to the proceeding who claims that a District order is inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Regulation and any person named in the order within 20 days of the rendering of the District order. However, if the order to be reviewed is determined by the Commission within 60 days after receipt of request for review to be of statewide or regional significance, the Commission may accept a request for review within 30 days of the rendering of the order.

4. A District action or order is considered "rendered" after it is signed by the Chairman of the

Governing Board on behalf of the District and is filed by the District Clerk.

5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 and #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

COY A KOONTZ
120 ENSENADA DRIVE
ORLANDO FL 32825

at 4:00 PM this 9TH day of JUNE, 1994.

/s/PATRICIA C. SCHULTZ
PATRICIA C. SCHULTZ
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

CERTIFIED MAIL # P 377 543 246

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. Cl-94-5673

FILED Aug. 19, 2002

COY A. KOONTZ, JR., as personal representative of the estate of Coy A. Koontz, deceased,

Plaintiff,

v.

THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, et. al.

Defendants.

_____/

JOINT PRE-TRIAL STATEMENT

The parties to this action, by and through their undersigned attorneys, execute and caused to be filed this joint pre-trial statement in compliance with paragraph 6(b) of the Court's April 4, 2002, Pre-Trial Order. The Roman Numerals below correspond to the numbers of the subparagraphs under paragraph 6(b) of the Pre-Trial Order.

I. Statement of the Case.

A. Plaintiff's Position:

In 1971, Coy A. Koontz (Koontz) purchased approximately 14.9 acres of property located in East Orange County, adjacent to State Road 50, a major East-West arterial route. The property was

transcended by a cleared and mowed high transmission power line. The surrounding area was under intense development as a result of the recent construction of the 417 Beltway.

Koontz purchased the property for investment purposes in 1971, at which time one hundred percent (100%) of the property was useable and zoned commercial. The State enacted the Warren S. Henderson Wetland Protection Act in 1985, and the District subsequently implemented a rule referenced as the "Econ River Rule". As a result of the legislation and the rules referenced, less than fifteen percent (15%) of the property remained useable.

A portion of the Koontz property was purchased by the Expressway Authority for an off-ramp at State Road 50, for the 417 Beltway and the Florida Department of Transportation (DOT) had previously been granted a drainage easement across the Koontz property. Koontz engaged in litigation with Orange County and the DOT over the issue of excessive water flowing onto his property, which was not anticipated by the drainage easement granted to DOT. It was ultimately determined that the easement granted DOT was not in the correct location, and a settlement was reached whereby the easement was relocated to the far westerly portion of the Koontz property, with the intent and understanding that the remaining portion of the property could then be utilized for retention for any subsequent development of the property. During the litigation with the County and DOT, Koontz became aware of the necessity to apply for a permit from the Water Management District to develop the property.

Koontz made the appropriate applications, with the District to obtain a Management of Storage and Surface Water Permit (MSSW) and a Wetlands Resource Management Permit (WRMP).

The District staff told Koontz that his property was in the Riparian Habitat Protection Zone (RHPZ or Zone) and that his property could not be utilized without agreeing to both on-site and off-site mitigation. Koontz argued that the entire property was a "fractured" system, and a portion of the five (5) acres proposed to be used by Koontz was that property lying under a cleared and mowed power line. Ultimately the District staff advised it would not accept Koontz proposal, but insisted that Koontz could only develop three and one-half (3½) acres of his property and place eleven and one half (11½) acres of his property in a conservation easement. Koontz accepted the District's proposal for mitigation, however, immediately preceding a meeting of the Water Management District Board in Palatka, Koontz was advised that an additional fifty (50) acres of State property had to be maintained and cleaned up as part of the mitigation requirement. The additional requirement was to replace culverts and clean out ditches on District owned property, known as Howell Scott Preserve and the Demetree project. The District staff took the position that the additional mitigation was necessary to offset "impacts to fish and wildlife from the proposed project".

The Koontz property is four to five miles from the *District owned property* and there was no evidence, scientific or otherwise, provided to Koontz that indicated any environmental impact to the fish and wildlife on the subject property. Without providing

any evidence at the Board hearing, the staff stated that the Koontz property was a high-quality wetlands in the RHPZ and advised the Board that an impact in the RHPZ was "presumed to be harmful, unless the applicant demonstrates otherwise". The District Board entered a final order requiring Koontz to submit to excessive mitigation requirements and/or ratios to develop his property without evidence or proof that the required mitigation ratios advanced any substantial purpose.

Koontz brought an action in the Orange County Circuit Court, challenging the constitutionality of the RHPZ rules, and in addition, alleging a violation of substantive due process and equal protection rights, as well as inverse condemnation of this property. The trial court, dismissed all five counts of Koontz Complaint, with prejudice and an appeal was taking to the Fifth DCA. The 5th DCA, in an opinion, affirmed the lower court's dismissal of all the actions except Count III, alleging both temporary and permanent inverse condemnation by virtue of the regulatory taking.

B. Defendant's Position:

The only remaining count in this lawsuit is Count III, an inverse condemnation regulatory taking claim under Article X, section 6, Florida Constitution and section 373.617, Florida Statutes. In Count III, Plaintiff claims that two 1994 District permitting decisions inversely condemn the subject property.

Count III of the AMENDED COMPLAINT alleges that the permitting decisions "deprive Koontz of the economically viable use of his property" (¶49); "destroys the economically viable use of Koontz's

property" (¶52); "the mitigation requirements set at the Board meeting, and the cost of mitigation, are impossible to accomplish while maintaining an economical viable use in the property" (¶54). Denial of substantially all economically beneficial or productive use of his land was the basis for Koontz's argument, as noted by the appellate Court:

> Koontz made a specific application to the District for permits that would permit him to develop a fraction of his property. His position, in effect, was that the application he filed and the concessions he was willing to make to the District in order for it to issue the permits (his giving up over two-thirds of his property to the District) ***was all that he could do and still retain an economic use of his property***. The District turned him down. . . . The owner in this case drew a line in the sand and told the District: "I can go no further." **Whether the owner can now convince the court that there has, in fact, been a taking is the issue properly before the trial court.**

Koontz v. St. Johns River Water Management Dist., 720 So.2d 560, 561, 562 (Fla. 5th DCA 1998) (footnote omitted, emphasis added).

While it is true that the two 1994 District permitting decisions denied Plaintiff's applications for permits, the denials were based exclusively on the fact that Plaintiff would not provide additional mitigation to offset impacts from the proposed project. Had Plaintiff offered the additional mitigation—which a contractor hired by the District says would cost

approximately $10,000 to accomplish—the exact project Koontz proposed would have been permitted.

Under Florida law, inverse condemnation occurs "where regulation denies substantially all economically beneficial or productive use of land." *Tampa-Hillsborough County Expressway Authority v, A.G.W.S. Corp.*, 640 So.2d 54, 58 (Fla. 1994). Plaintiff has now conceded that his claim is not based on a theory that the two District permitting decisions deprived him of all or substantially all economically beneficial or productive use of the subject property. Instead, plaintiff now attacks the correctness of the underlying District permitting decisions, claiming that the mitigation that would be required to obtain a permit is "excessive."

Although Plaintiff rails against the District's AHPZ rule, the RHPZ rule plays an almost invisible role in this case. Three and one-half of the 3.7 acres that Plaintiff proposes to fill are wetland acres. The off site mitigation about which Plaintiff complains was wetland enhancement, intended as mitigation for impacts that would result from the proposed filling of wetlands. Consequently, this case is essentially a run-of-the-mill dredge and fill case. The RHPZ plays virtually no role in the allegedly excessive mitigation.

Regardless, under existing Florida law, a Plaintiff cannot challenge the correctness of the underlying agency decision in an as-applied inverse condemnation case. *Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1984) ("the propriety of the agency action must be finally determined *before* a claim for inverse condemnation exists") (emphasis added); *Key Haven Assoc., Enterprises, Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund*, 427 So.2d 153, 159 (Fla.

1982) (A landowner can proceed into circuit court on an as-applied regulatory inverse condemnation claim only if the landowner "is willing to accept all actions by the executive branch as correct both as to the constitutionality of the statute implemented and as to the propriety of the agency proceedings"); *Janson v. City of St. Augustine*, 468 So.2d 329 (Fla. 5th DCA 1989) (landowner "could seek circuit court relief for *any* claim of inverse condemnation arising from any agency decision only with the underlying premise that the unappealed agency action was valid") (emphasis added). Plaintiff's challenge to claimed "excessive mitigation" is a direct challenge to the correctness and validity of the underlying agency permitting decisions, something that cannot be pursued in a regulatory as-applied inverse condemnation case.

II. **Statement of Facts That are Admitted.** The following is a specific list of facts that are admitted by all of the parties to this action:

(A). The District, a special taxing district created by Chapter 373, F.S., is charged with the duty to prevent harm to the water resources of the District and to administer and enforce Chapter 373, F.S., and the rules promulgated thereunder.

(B). In December 1972, Koontz and his wife purchased approximately 15 acres of real property in Orange County, Florida.

(C). The approximately 15 acres of real property purchased in December of 1972 was located south of State Road 50 just east of the present location of the Eastern Extension of the East-West Expressway in Orange County.

(D). The subject property was a part of the approximately 15 acres of real property purchased in December of 1972.

(E). In the spring of 1994, Koontz applied to the District for a wetland resource management (WRM) permit under Chapter 62-312 Fla. Admin. Code, to dredge and fill 3.4 acres of wetlands on the subject property in connection with the proposed project to develop the land.

(F). In the spring of 1994, Koontz also applied to the District for a management and storage of surface waters (MSSW) permit under Chapter 40C-4, Fla. Admin Code, to construct and operate a surface water management system to serve an unspecified commercial development on the subject property.

(G). The subject property lies almost entirely within the Riparian Habitat Protection Zone ("RHPZ") of the Econlockhatchee River Hydrologic Basin ("Basin") designated by District regulatory rules 40C-4.041(2)(b)9 and 40C-41.063(5)(d)1, Fla. Admin. Code, and is subject to the District's regulatory jurisdiction.

(H). The proposed project constitutes a surface water management system that included an unspecified commercial development and a dry-bottom retention/detention basin on 3.7 acres of fill.

(I). At the time the final orders were entered, approximately 11 acres of the subject property were herbaceous wetlands bisected by a tributary of the Econlockhatchee River.

(J). At the time the final orders were entered, approximately 1.3 acres of uplands were located in the northernmost part of the subject property and 1.8 acres

of uplands lie in the southeastern corner of the property.

(K). Koontz's proposed project would result in the loss of 3.4 acres of wetlands and .3 acres of upland in the RHPZ.

(L). The District staff suggested several design alternatives to Koontz to reduce and offset the adverse impacts to RHPZ fish and wildlife so that the District could permit the proposed project. Specifically, as set forth in the final orders:

> (1) The District proposed that Koontz reduce the scale of his commercial development to .07 acres of wetlands and .03 acres of uplands within the RHPZ with mitigation in the form of a conservation easement or deed restriction over the remaining undeveloped wetlands and uplands, minus the .04 acre portion covered by an existing paved road and the .05 acre portion of the right-of-way.
>
> (2) Alternatively, the District proposed that in addition to Koontz's proposed on-site mitigation plan, that Koontz also provide off-site mitigation by restoring and enhancing at least fifty (50) acres of wetlands on a District-owned parcel (Hal Scott Preserve) on the Econlockhatchee River located about four and a half miles southeast of Koontz's parcel. The

replacement of non-functioning culverts would enhance the wetland functions to wildlife in the Preserve and maintain the hydrologic function of the wetland system. Also, several upland ditches have altered the natural hydroperiod of some isolated wetlands and the plugging of those ditches would rehydrate the affected wetland systems and enhance the wildlife functions of the Econ Basin.

(3) Alternatively, the District also proposed, as off-site mitigation, in addition to Koontz's proposed on-site mitigation, that Koontz could restore and enhance at least fifty (50) acres of wetlands on a District-owned parcel (Demetree parcel) in the Econ Basin located about seven miles northeast of the Koontz property. The plugging or elimination of a series of upland ditches connected to several wetlands would assist the rehydration of the wetland system and enhance the wetland functions to wildlife in the Basin.

(4) The District would also favorably consider equivalent mitigation enhancement options on other properties within the Basin proposed by Koontz.

(M). Koontz did not seek a section 120.57, Florida Statutes, hearing or otherwise administratively challenge either of the final orders.

(N). Koontz did not appeal either of the final orders.

(O). Koontz initiated this lawsuit on August 22, 1994.

(P). Koontz's proposed development requires a permit from Orange County.

(Q). Orange County has not issued a permit for Koontz's proposed project.

(R). The United States Corps of Engineers has not issued a permit for Koontz's proposed project.

(S). With respect to the Regulatory Takings claims set forth in Count III of the AMENDED COMPLAINT filed in the instant case, Plaintiff is not proceeding upon a theory that the two District final orders deprived Koontz of all or substantially all economically beneficial or productive use of the subject property.

(T). The exhibit identified as "Boundary sketch of property Koontz purchased in 1972" is an accurate representation of the boundaries of the property Koontz purchased in 1972, a purchase that included the property that is the subject of this litigation.

(U). The exhibit identified as "Boundary sketch of Koontz property showing part that was condemned through Orange County Circuit Court Case No. Cl 87-9182" is an accurate representation of the boundaries of the Koontz property that was condemned through

Orange County Circuit Court Case No. Cl 87-9182. {Plaintiff objects to the relevance of this fact}

(V). The exhibit identified as "Boundary sketch of Koontz property showing drainage easement areas" is an accurate representation of the boundaries of the Koontz property and the drainage easement areas within that property.

III. Issues of Fact to be Litigated.

A. Plaintiff's Issues:

(1). The issue before this Court is whether the conditions imposed by the District on the Koontz property and in particular, the required mitigation, resulted in a regulatory taking of the Koontz property. The off-site mitigation did not serve a substantial purpose.

B. Defendant's Issues:

(1) The only ultimate fact issue regarding any plaintiff's regulatory inverse condemnation claim is the amount by which the economically beneficial or productive use of the plaintiff's property has been diminished as a result of agency action. Since Koontz has now conceded that his Count III claim is not based on a theory that the two District permitting decisions deprived him of all or substantially all economically beneficial or productive use of the subject property, there appears to be no factual issue to be decided by the court.

IV. Significant Issues of Law.

The following significant issues of law remain to be decided with respect to this case:

A. Plaintiff's Issues:

The Court will review the evidence presented to determine if the District has required dedications or exactions that are so excessive that the conditions amount to a taking of Koontz property and in particular whether the conditions imposed were necessary. The Plaintiff will submit testimony and evidence, which will establish that the District's demands, requirements, and conditions imposed upon the Koontz application were excessive and without basis.

B. Defendant's Issues:

(1) Whether Florida law allows Plaintiff to present evidence attacking what Plaintiff characterizes as "demands, requirements, and conditions imposed upon the Koontz application as excessive and without basis" through the pending inverse condemnation claim. (This issue is briefed in Defendant's Motion in Limine and Plaintiffs responsive pleading).

(2) Whether Plaintiff has stated a cause of action for a temporary taking or for a taking based on excessive or unnecessary dedications or exactions.

(3) Whether excessive or unnecessary dedications or exactions constitute a taking under Florida law.

(4) Whether the District's final orders deny Koontz substantially all economically beneficial or productive use of his land.

(5) Whether the analysis described in paragraph 4(A) immediately above must be applied to Koontz's property as originally purchased, before part of it was condemned.

(6) Whether objections to exhibits are well founded.

(7) Each parties entitlement to attorney's fees.

V. List of Parties' Trial Witnesses.

Attached hereto as Exhibit "A" is Plaintiff's list of witnesses.

Attached hereto as Exhibit "B" is Defendant's list of witnesses.

VI. Schedule of Parties' Exhibits.

Attached hereto as Exhibit "C" is the parties' Joint Schedule of Exhibits to be offered at trial, without objection, as joint exhibits.

Attached hereto as Exhibit "D" is Plaintiff's Schedule of Exhibits, listing exhibits that may be offered at trial, to which defendant has noted its objections, if any.

Attached hereto as Exhibit "E" is Defendants' Schedule of Exhibits, listing exhibits that may to be offered at trial, to which plaintiff has noted his objections, if any.

IV. Number of days required for trial.

One day.

VIII. Other agreed matters.

None.

DATED this 19th of August, 2002.

/s/William H. Congdon
William H. Congdon
Fla. Bar No. 0283606
Attorney for St. Johns
River Water
Management District
P. 0. Box 1429
Palatka, FL 32178-1429
(386) 329-4314

/s/Michael D. Jones
Michael D. Jones
Fla. Bar No. 0137608
Attorney for Plaintiff
P. O. Box 196130
Winter Springs, FL
32719-6130
(407) 695-7666

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by ~~United Sates Mail~~ hand delivery this 21st day of August, 2002, to Michael D. Jones, ESQUIRE, Attorney for Plaintiff, P.O. Box 196130, Winter Springs, FL 32719-6130.

/s/William H. Congdon
William H Congdon

IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

COY A. KOONTZ,

Plaintiff,

v.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Defendant.

FILED Aug. 16, 2002

Case No.: CI-94-5673

_____/

PLAINTIFF'S TRIAL BRIEF AND RESPONSE TO DEFENDANT'S MOTION IN LIMINE

COMES NOW, the Plaintiff, COY A. KOONTZ, JR. ('KOONTZ"), as personal representative of the Coy A. Koontz Estate and presents its Trial Brief, as well as its response in opposition to the Defendant's Motion in Limine and would further state:

STATEMENT OF THE CASE AND THE FACTS

In 1972, Coy A. Koontz (Koontz) purchased approximately 14.9 acres of property located in East Orange County, adjacent to State Road 50, a major East-West arterial route. The property was transcended by a cleared and mowed high transmission power line. The surrounding area was under intense development as a result of the recent construction of the 417 Beltway.

Koontz purchased the property for investment purposes in 1971, at which time one hundred percent (100%) of the property was useable and zoned commercial. The State enacted the Warren S. Henderson Wetland Protection Act in 1985, and the District subsequently implemented a rule referenced as the "Econ River Rule". As a result of the legislation and the Econ Rule, less than fifteen percent (15%) of the property remain useable.

In 1985, a portion of the Koontz property was purchased by the Expressway Authority for an off-ramp at State Road 50, for the 417 Beltway. The Florida Department of Transportation (DOT) had previously been granted a drainage easement across the Koontz property. In 1988, Koontz engaged in litigation with Orange County and the DOT over the issue of excessive water flowing onto his property, which was not anticipated by the drainage easement granted to DOT. It was ultimately determined that the easement granted DOT was not in the correct location, and a settlement was reached whereby the easement was relocated to the far westerly portion of the Koontz property, with the intent and understanding that the remaining portion of the property could then be utilized for retention for any subsequent development of the property.

During the litigation with the County and DOT, Koontz became aware of the necessity to apply for a permit from the Water Management District to develop the property.

During the litigation with the County and DOT, Koontz became aware of the necessity to apply for a permit from the Water Management District to develop the property. Koontz made the appropriate

applications, with the District, to obtain a Management of Storage and Surface Water Permit (MSSW) and a Wetlands Resource Management Permit (WRMP).

The District staff told Koontz that his property was in the Riparian Habitat Protection Zone (RHPZ or Zone) and that his property could not be utilized without agreeing to both on-site and off-site mitigation. Koontz argued that the entire property was a "fractured" system, and a portion of the five (5) acres proposed to be used by Koontz was that the property lying under a cleared and mowed power line. Ultimately the District staff advised it would not accept Koontz proposal, but insisted instead that Koontz could only develop approximately three and one-half (3½) acres of his property and place approximately eleven and one-half (11½) acres of his property in a conservation easement.

Koontz accepted the District's proposal for mitigation, however, immediately preceding a meeting of the Water Management District Board, Koontz was advised that an additional fifty (50) acres of State property had to be enhanced as a part of the mitigation requirement. The additional requirement was to replace culverts and clean out ditches on District owned property, known as Howell Scott Preserve and the Demetree project. The district staff took the position that the additional mitigation was necessary to offset *"impacts to fish and wildlife from the proposed project"*.

The Koontz property is several miles from the District *owned property* and there was no evidence, scientific or otherwise, provided to Koontz that indicated any environmental impact to the fish and

wildlife on the subject property. Without providing any evidence at the Board hearing, the staff stated that the Koontz property was a high-quality wetlands located in the RHPZ and advised the board that an impact in the RHPZ was presumed to be harmful, unless the applicant—demonstrates otherwise". The District Board entered a final order requiring Koontz to submit to excessive mitigation requirements and/or ratios to develop his property without evidence or proof that the required mitigation ratios advanced any substantial purpose.

Koontz brought an action in the Orange County Circuit Court, challenging the constitutionality of the RHPZ rules, and in addition, alleging a violation of substantive due process and equal protection rights, as well as inverse condemnation of his property. The trial court dismissed all five counts of Koontz Complaint, "*with prejudice*" and an appeal was made to the Fifth DCA (727 2d 560 (5th DCA 1998)). The 5th DCA, in the opinion (attached hereto as Exhibit "A"), affirmed the lower court's dismissal of all the actions except Count III, which alleges both temporary and permanent inverse condemnation by virtue of the conditions imposed in the final order.

ISSUES BEFORE THE COURT

The Fifth DCA framed the issues to be considered by this Court:

- Where would an owner look in the Statutes or the District's rules to see what would be required of him to get a permit?
- What criteria would the staff person determining the two-thirds (2/3) of his (Koontz) property would be required instead of one-half (1/2)?

- Why was off-site mitigation necessary and, if necessary, why not require mitigation on both parcels?
- What would insure that if his neighbor made a similar application, similar demands would have been made on him?
- Would the District requirements have been the same, if a different staff person had been assigned to the case?
- How does a landowner or a prospective buyer reasonable assess what the District is likely going to require in order for development to take place in areas regulated by the District?

In questioning the standards in the necessity of the mitigation requirements, the Fifth DCA placed Plaintiff's case squarely within the holding of the United States Supreme Court in *Agin v. City of Tiburon*, 447 US 255 (1980), where the Court set forth the essentials of a taking action. The *Agin* Court held that a landowner is improperly singled out, contrary to the Fifty Amendment Taking Clause ***either*** when he is confronted with the regulation that does not substantially advance a legitimate government interest or when regulation deprives him of all economical viable use. Regulatory agencies forget, as does the District herein, and lower courts continue to confuse that ***either*** element is sufficient to raise the taking issue.

The general test for regulatory taking liability outlined in *Agins* was cited in *US v. Riverside Bayview Homes, Inc.*, 474 US 121 (1985); *Keystone Bituminous Coal Association v. deBenedictis*, 480 US 4790 (1987); *Nollan v. California Coastal Commission*, 483 US 825

(1987); *Lucas v. South Carolina Coastal Council*, 501 US 1003 (1992); and *Dolan v. City of Tigard*, 512 US 374 (1994).

In the *Agins* dispute, the City of Tiburon, implementing the open space policy of its general plan, adopted ordinances modifying existing zoning ordinances, which allowed five (5) units to be built without further land use approval, and placed the Agins property in a more restrictive residential planned development and open space zone. The Agins *never sought approval for development of their land* under the zoning ordinance, but instead filed suit in State Court, alleging a taking of their property. The United States Supreme Court affirmed the decision of the California supreme Court holding that the ordinances did not constitute a taking because the application of a general zoning law to a particular property becomes a taking if the ordinance either "does not substantially advance a legitimate state interest" or "denies an owner economical viable use of his land". The Court concluded that the open space ordinance substantially advanced a legitimate government goal of discouraging premature and unnecessary development.

The first part of the Agins test is labeled "the required nexus" rule. In rule. In *Keystone Bituminous Coal Association v. deBenedictis*, 480 US 470 (1987), the Supreme Court acknowledged that the two *Agins* test "had become an integral part of our taking analysis". In the instant cause, Koontz will present evidence to this Court confirming that the District's final orders do not substantially advance the purpose of which they are intended.

Koontz has specifically plead that the final order does not bear a reasonable relationship between the mitigation and the impact of the proposed development and thus is not roughly proportionate (paragraph 50) and that the rules as applied through the final order do not substantially advance a legitimate State interest (paragraph 61).

The District in its Motion in Limine relies upon the old "standard" government defense that the property owner has not exhausted administrative remedies and therefore the issue is not ripe for litigation, or in the alternative that the failure of the property owner to go through an administrative remedies, somehow foreclosed his right to present challenges long approved by the United States Supreme Court.

In the instant case, the Fifth DCA in *Koontz* laid to rest the issue of "ripeness" and directed itself to the constitutionality of the regulatory taking as opposed to the correctness of the final order. The Fifth DCA has signaled this Court to scrutinize the necessity of the mitigation, and in particular, does the mitigation substantially advance the State's interest in offsetting wetlands impact on the Koontz property. The substantial advanced prong of *Agins* requires a casual connection or nexus between a regulatory means and end.

The District's Motion in Limine ignores the *Agins* two-prong test and thus wastes enormous time and space concluding that Koontz cannot challenge the correctness of the proprietary action of the agency in an inverse condemnation proceeding. The District likewise wrongfully states that the "only issue" in the instant case is whether the valid district permitting decision deprives "Koontz of all or substantially all

economical, beneficial or productive use of the subject property as a whole". To the contrary, the only issue is whether the district's actions in imposing off-site mitigation substantially advanced the State's interest in the impacts to fish and wildlife from the proposed project, or as more particularly stated by the Fifth District, was the mitigation necessary?

Plaintiff reluctantly acknowledges that the Florida Supreme Court in 1982 suggests in *Key Haven Enterprises, Inc. v. Board of Trustees The Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1982), that a claim for inverse condemnation should first go through the administrative process. Many State courts have failed to properly analyze the *Key Haven* decision and thus ignore that the Court stated that the administrative review was not required by the law, but instead was *judicial policy*. Indeed the Fourth District determined that whether a controversy involving administrative agency lies in the court instead of the agency itself in administrative proceedings is a question of policy and not *subject matter jurisdiction*. *South Lake Worth Inlet district c. Town of Ocean Ridge, et al.*, 633 So.2d 79.

The District's reliance upon *Key Haven*, supra; *Albrecht v. State*, 24 So.2d 8 (Fla. 1984) and *Bowden v. Florida Department of Environmental Regulations*, 448 So.2d 566 (2nd DCA 1984) is misplaced. The United States Supreme Court in 1987 issued three land use decisions, which put new light upon inverse condemnation actions and, in particular, regulatory takings. While Florida Courts have held in essence that the property owner must accept the correctness of the agency action before brining a inverse condemnation action, the United States Supreme

Court in *Nollan v. California Coastal Commission*, 483 US 825 (1987), followed by Lucas, established that a government agency may no longer defend oppressive police power regulations which are inconsistent with a public interest.

Lower Courts, especially Florida Courts, treat agency determinations and legislative decisions without questioning or attempting to distinguish between the standard for review in a regulatory taking analysis as compared to that standard for review in a substantive due process matter. The Courts correctly minimized the scrutiny of a substantive due process matter. The Courts correctly minimized the scrutiny of a substantive due process issue by merely reviewing the agency's findings in determining that the reasonableness of its decisions are "correct" or pass the "substantial evidence" test. If the matter is fairly "debatable", the government wins. However, the Supreme Court in *Lucas* noted that if a test for compensation for a regulatory taking was based simply upon the legislative findings and/or administrative findings, such formulations could be advanced in virtually every case, reducing the test of whether the "legislature has a stupid staff". Simply by issuing valid and/or correct orders, the agencies could continue to ignore the *Agins* test and hide behind the "correctness" and "validity" of the administrative process. Such is not the intent of the United States Supreme Court, nor the Florida Legislature. If the Court were to embrace the arguments advanced by the District in its Motion in Limine, a property owner would be prohibited from challenging the agency's position under the first prong of the *Agins* test.

Since *Key Haven*, the United States Supreme Court has addressed the taking issue and the law of "taking" has now come to recognize that property owners are not chained to an antiquated process as advanced by the *Key Haven* Court. Indeed, the Florida Legislature itself revisited the Administrative Procedures Act and enacted changes that directly affected regulatory taking issues (§253.763, Florida Statutes). The Legislature enacted the Burt Harris Property Rights Act, which was specifically designed to circumvent the administrative process and alleviate the ripeness defense utilized by the agency. It is easy therefore to understand why the Supreme Court continues to reaffirm the *Agins* test.

There must be a substantial basis for the agency action and the *Agins* test was not lost upon the Fifth DCA in the *Koontz* matter. The Court specifically was concerned with the mitigation necessity, which is just another way of questioning whether the mitigation substantially advanced the State interest in protecting or compensating for the wetland impact on the Koontz property.

The *Koontz* Court was concerned with the mitigation conditions imposed on Koontz and questioned why he could not "draw a line in the sand".

At trial, environmental consultants will testify that notwithstanding the correctness of the procedure and the findings of the District, the mitigation requirements imposed did not advance the legitimate State interest. Granted, mitigation of any sort is a benefit to the State, but a benefit cannot be confused with a requirement that the exaction substantially advances the State's interest in offsetting the wetland impact on the Koontz property.

The Court cannot overlook the testimony that will establish the ***Agins*** test has not been met by the District. While Koontz does not seek compensation as a result of the loss of all economical viable use of his property, it is not conceded that compensation for a partial taking and a diminution in value is not appropriate. Koontz if entitled under Supreme Court precedent "to draw a line in the sane" to protect what he feels are his constitutional rights. Only when the District can answer the questions posed by the Fifth DCA, can we determine if there has been a taking as a result of failure to advance the substantial State interest.

Where were the standards that supported the conditions? There is no scientific data that appears in the record, which supports the mitigation requirement that Koontz clean out fifteen (15) state culverts on State property several miles from the Koontz property. The requirement that Koontz enhance fifty (50) acres of wetlands, unrelated to his project, does not substantially advance the State's interest in protecting the fish and wildlife impacts on the Koontz property and is therefore unconstitutional.

The Fifth District's pointed questions beg an answer. The answer is not, as the District suggests, found by default as a result of Koontz failing to pursue the administrative remedies suggested by the District. *Key Haven's* announces only a judicial principal that a property owner must first pursue administrative remedies and that principle may have been appropriate in 1982, but twenty (20) years later and a half-dozen (1/2) dozen United States Supreme Court land use cases over shadow the impact of the *Key Haven* decision.

Koontz makes a direct challenge to the final orders alleging that the excessive mitigation was not even roughly proportionate to the alleged impacts on-site, and that the required off-site mitigation served no useful benefit, or more appropriately stated, did not substantially advance the government's interest in fish and wildlife on the Koontz property.

The Koontz witnesses will confirm that notwithstanding the validity of the Board's procedural process and its requirement that there by mitigation, the final orders resulted in a taking of the Koontz property as a result of the unnecessary mitigation requirement.

The evidence and testimony presented by Koontz will negate the impact of *Key Haven*, *Albrecht*, Bowden, et al. Instead this court will see evidence and testimony that notwithstanding the correctness of the District's administrative order, the application of the first prong of the *Agins* test prove a taking of Plaintiff's property. A finding that the property has been taken by the district's actions is not a death blow, to the contrary, Florida Statutes 253.763 outlines three alternatives available to the agency, one of which is to simply allow the development consistent with the Koontz applications without off-site mitigation.

WHEREFORE, the Plaintiff prays this Court to deny the Defendant's Motion in Limine for reasons set forth herein and direct this matter to trial in a timely manner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Facsimile and U. S. Mail to WILLIAM H. CONGDON, ESQUIRE, St.

Johns River Water Management District, Post Office Box 1429, Palatka, Florida 32178-1429, this 16th day of August, 2002.

Leffler & Associates, P.A.
Michael D. Jones, Esquire
Florida Bar Number: 0137608
P. O. Box 196130
Winter Springs, Florida 32719-6130
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IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL
CIRCUIT, IN AND FOR
ORANGE COUNTY,
FLORIDA

FILED Nov. 21, 2002

CASE NO. Cl-94-5673
DIVISION 33

COY A. KOONTZ, JR., as personal representative of the estate of Coy A. Koontz, deceased,

Plaintiff,

v.

THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, et. al.

Defendants.

_____/

ORDER DENYING MOTION FOR REHEARING

This case cannot be decided without interpreting *Koontz v. St. Johns River Water Management Dist.*, 720 So.2d 560 (Fla. 5th DCA 1998). That opinion contains directions to the trial judge. A mandate to the trial court accompanies the decision. This court is duty bound to follow these directions and mandate. Interpreting the Fifth District Court's Koontz consumed more time in deciding than any other aspect of the case.

For this court to adopt the position of the St. Johns Water Management District would flout the district court's opinion. It would amount to this court

dismissing the appellate court's opinion as being uninformed, ill considered and ill advised.

The St. Johns Water Management District asserts that this court, the trial court, misapprehended a critical fact. But, it is not really the trial court that is argued to have misapprehended a fact. The St. Johns Water Management District is actually arguing that the Fifth District Court of Appeal misapprehended a fact. The fact allegedly misapprehended by the district court of appeal was that the Plaintiff Koontz had not lost all or substantially all economical and viable use of his property.

This trial court has reviewed the entire record in the case that was available to the district court. It does not appear that in his Amended Complaint, plaintiff based his case on losing all or substantially all use of the property. Instead, the Amended Complaint of Koontz makes the gravamen of his case that "the mitigation requirements set at the Board meeting, and the cost of the mitigation, are impossible to accomplish while maintaining an economical viable use in the property" (¶54). The plaintiff's case from the outset has focused on the cost of the mitigation requirements.

Furthermore, all of the circumstances reflected in the history of dealings between the owner and the district make clear nobody ever said there was a denial of all or substantially all viable, economical use. As the appellate court noted in its line-in-the-sand metaphor, it was strictly a question of <u>how</u> <u>far</u> the district could go in its requirements.

This court has determined that the denial of the Koontz application by the St. Johns Water Management District was invalid. As a judge, the

undersigned is not empowered to fix compensation, should it come to that. The denial was invalid from the date of denial.

Therefore, the Defendant's Motion for Rehearing is denied.

DONE AND ORDERED this 21st day of November, 2002, at Orlando, Orange County, Florida.

JOSEPH P. BAKER, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing memorandum was sent by regular U.S. Mail this 9th day of October, 2002, to: Michael D. Jones, PO Box 196130, Winter Springs FL 32719-6130, and to; William Congdon, PO Box 1429, Palatka FL 32178-1429.

JUDICIAL ASSISTANT

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: CI-94-5673

COY A. KOONTZ, JR., as personal representative of the estate of Coy A. Koontz, deceased,

Plaintiff,

vs.

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THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and PATRICIA T. HARDEN, LENORE MCCULLAGH, WILLIAM SEGAL, REID HUGHES, JOE E. HILL, JAMES H. WILLIAMS, and DENISE M. PRESCOD, each as a member of the Governing Board of the St. Johns River Water Management District,

Defendants.

Transcript of proceedings held before the Honorable Joseph Baker, Judge of the Circuit Court, Orange County, Florida, on August 28 and August 29, 2002, beginning at 9:10 a.m, at the Orange County Courthouse, Orlando, Florida, before Carmen J. Thomas, RPR and Notary Public, State of Florida at Large.

APPEARANCES:

MICHAEL JONES, ESQUIRE
Atrium II Building, West State Road 434
Suite 317
Winter Springs, Florida 32708

On behalf of the Plaintiff.

WILLIAM CONGDON, ESQUIRE
ST. Johns River Water Management District
Post Office Box 1429
Palatka, Florida 32178-1429

On behalf of the Defendants.

***

[13]

WILLIAM FOGLE, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q Would you state your name, your address and your occupation, please, sir.

A My name is William C. Fogle. I'm a professional engineer. Address is 8969 Charles E

[14]

Limpus Road, Orlando, Florida.

Q Mr. Fogle, would you explain to the Court your involvement with the Coy Koontz parcel and what your duties were with regard to that.

A Yes, sir. I was a professional engineer employed by Coy Koontz to assist him in the reclamation of

wetlands on his property to that and we had boundary surveys done to topographic surveys done.

I hired environmental engineers to work with me to evaluate on site wetlands, prepared a mass grading and drainage plan and assisted in the preparation of the mitigation plan for—for the wetlands we wanted to reclaim on the property, prepared permit applications to the St. Johns River Water Management District.

Q Let me show you what has been listed as joint exhibit, the permit, MSSW permit application, a request for additional information, response to the MSS permit application and a dredge and fill permit application, ask you if you can identify these, please.

A Yes, sir. These are the permit applications and response to questions we prepared for Coy Koontz on the property in question.

***

[15]

Q Mr. Koontz (sic), would you describe to the Court the application and what you proposed to the District for the development this property.

A Okay. The site is approximately 15 acres in size located south of Highway 50 east of the Expressway connection at the western end on the east side of town.

Project was analyzed to have a significant amount of wetlands going to the definition of wetlands supplied by the Water Management District. There was—out of the 15 acres, approximately a little over one acre was considered uplands. The remaining portion of the property was considered wetlands. Coy Koontz had

[16]

tried for years to sell the property—

MR. CONGDON: Objection, your Honor. That's not responsive to the question and it's either based on speculation or hearsay unless he lays a predicate for personal knowledge about the attempted sale of the property.

THE COURT: That's fair enough.

BY MR. JONES:

Q Okay. Continue.

A He was unable to sell the property.

Q Don't discuss what you don't know.

A Well, we were retained to try and make the property usable so he could sell the property. In order to do that, we recommended that he file a mass grading permit and reclaim as much of the wetlands as possible given the regulatory climate at the time.

To that end we prepared a mass grading plan, storm water retention plan for the property where we tried to reclaim about 3.4 acres of the 15 acre site to give him some economic benefit, the possibility of selling the property at the completion of the permit—

Q Okay.

[17]

A —process.

Q What in particular did you propose to the District as far as the development itself and the mitigation in your permit process?

A When we evaluated the property, the property is bisected by a power line if you can see on the map. The retention pond on the property was proposed to go underneath the power line areas. We were recommending to Coy that the development of the area north of the power line was a viable alternative, affected the worse portions of the wetlands on the property, didn't encroach into the hundred year floodplain on the property and was a reasonable amount of acreage that he would have available for sale in order to recoup the investment he had in his property.

Q Did you have an environmental survey done of the property?

A Yes, sir. We had Morgan Environmental Consultants do an environmental survey of the property.

Q Is that—or was that evaluation attached to your application?

A Yes, sir, it was.

Q Did Mr. Morgan, to your knowledge, meet

[18]

with representatives of the District regarding his evaluation?

A I believe he did, sir.

Q Okay. Let me show you a copy of a letter dated February 18, 1994.

***

BY MR. JONES:

Q Identify, if you would please, this is an attachment to Mr. Morgan's letter to Exhibit 1?

A This is a copy of part of the work that Morgan Environmental Consulting did on the project.

Q What was the determination by Mr. Morgan as to the quality and the assessment—his assessment of the wetlands on the property?

A Again, the—the area south of the power line was considered fairly significant wetlands system. The area north of the power line was less.

Q Did that have anything to do with the decision on what to offer for mitigation?

A Certainly.

[19]

Q How is that?

A Again, we were, based upon our—the evaluation of mine and Jim Morgan we considered the area north of the power line a relatively insignificant wetland system with little—little wildlife value and that the preservation of the wetlands south of the power line on this particular case that encompassed the creek and the portions of the majority of the upland systems was an excellent system to preserve wetlands in the future.

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[21]

BY MR. JONES:

Q At the board meeting, was there additional requests made of the applicant at that time?

A Prior to the meeting we were informed

[22]

that we could do—this was like an hour before the meeting started that we could possibly resolve the—our disagreement with staff by doing additional off site mitigation in a couple of areas owned by the District.

Q You found out about that an hour before the meeting?

A On the off site mitigation, yes.

Q That was the first time the off site mitigation had been offered?

A Yes, sir.

Q Okay. And did they tell you what the off site mitigation was?

A Not in any great detail, other than it was replacing some culverts or working on some ditch systems on property that the District owned.

Q Did you subsequently receive a copy of a final order issued by the District in this matter?

A Yes, sir.

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[24]

Q I think both orders are basically the same. I just wanted to ask you if you'd look at I believe it's paragraph 14 page five that makes reference to approximately 15 inoperative and abandoned culverts.

A Yes.

Q This order was signed on June 9, 1994. Prior to that, had you ever been told that there was 15 culverts involved in the off site mitigation?

A No, sir, not till about an hour before the meeting.

MR. CONGDON: Your Honor, I object to his characterization of what the final order says as far as the 15 culverts were involved. That's really not what the final order says. I just want to object to his characterization of it that way. The final order is the best evidence.

THE COURT: Well, that's fair enough. It says whatever it says.

[25]

BY MR. JONES:

Q There is also—in that same paragraph they talk about additional—additionally there's several ditches constructed in uplands and these ditches need to be plugged or eliminated. Were you ever, before this date in '94, told that there were certain ditches that were to be plugged?

A No, sir.

Q Was any of the off site mitigation discussed with you about what it involved?

A No, sir.

Q I mean, were—

A Again, we—we had met with Water Management District during the permit process and we were aware that the mitigation that we had offered in the permit application wasn't satisfactory to staff. We went over options, possible options about reducing the amount of

property that we had developed. Instead of 3.4 we could have developed maybe one acre of wetlands at that time. We did evaluate the possibility of reducing the size of the wetland impacts and whether that would generate sufficient amount of income for Mr. Koontz to recoup his investment and

[26]

the property and make a reasonable profit on it and our evaluation was that one acre of a 15 acre tract from a development standpoint would not—would not be of any economic benefit to him.

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[27]

BY MR. JONES:

Q Okay. Were you able to assess, based on the reports from the biologist and from your meetings with the Water Management District staff, if there was an impact on fish and wildlife as a result of the proposed development you have here?

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THE WITNESS: Based upon the evaluation it was not on the site, no threatened or endangered species were determined to be located on this property. There was no what we consider, significant wildlife systems.

This property is an—was proposed to be surrounded by roadways and developments so it's been disconnected from—from connection to large wetland systems.

The only wildlife found on the property were small animals, raccoons, rabbits and

[28]

certain—I think one turtle and a number of different bird species were seen on the property.

Based upon our evaluation we didn't consider this a significant wildlife preservation area or didn't contain significant wildlife species or provided significant wildlife benefits.

BY MR. JONES:

Q So prior to the—

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[30]

BY MR. JONES:

Q I think I asked this question and I don't know that we got an answer to it. Were you able to make an assessment of whether there was a fish and wildlife impact? And I think you did answer that question.

A We don't—from the preservation of the 11 of the 15 acres maintain a significant amount of the wildlife function on the property. We preserved the area that we were recommending for

[31]

development, the 3.4 acres on the north end. We considered the development of that to have an insignificant impact on overall wildlife and fish and wildlife habitat issues.

Q Do you recall a member of the board questioning you about what he understood the staff was saying about the regulation? Do you understand what the staff—their objection to the mitigation was?

A Essentially they—I've permitted many projects through St. Johns River Water Management District and it's hard to determine what staff determines as far as appropriate mitigation on property. It's usually up to the consultants to generate a plan and then have that plan reviewed by District staff.

In this particular case we were giving up more than two thirds of the property for ongoing mitigation. We were giving up a significant wetland portion located on the southern portion of this property into a conservation easement. We were dedicating the majority of wetlands that were available on this property and contiguous to this wetlands system for preservation wildlife issues.

We considered this to be an excellent

[32]

mitigation plan for the amount of damage that we were doing to the wetlands on the north end of the property. The main problem we ran into when District reviewed this was a lot of our mitigation consisted of existing wetland systems and we ran into a prevailing issue that the District had basically already restricted wetland systems.

So to use on site wetlands for mitigation, we were not given much credit for conserving wetland regulations because the District had considered they regulated them and had already restricted them and prevented the owner from any use of those. That was upsetting to both Coy and myself.

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[33]

Q Now, was there any—subsequent to this meeting, did you have any further dealings with the Water Management District yourself after the District meeting?

A After the District meeting, no, sir.

Q There was no—did they ever contact you and give you any proposal for a cost of the off site mitigation?

A No, sir.

Q At any time were you ever advised of what the off site mitigation consisted of?

A No, sir.

***

[57]

Q Now, as far as the off site mitigation that was proposed at the board meeting, I believe the first time you heard about that was five p.m. the day before the board meeting, correct?

A It was almost immediately before the

[58]

board meeting. I had gotten a phone call the day before the meeting saying they wanted to meet with me before the meeting to discuss some things and my latest recollection was that the specific mitigation schemes for the off site that were presented by the District were given to me immediately before the board meeting, not the day before.

Q All right. So—and here we are, your recollection's eight years later. If the transcript of the board

meeting at page 22 were to reflect that you got the staff's recommendation at 5:30 Monday night, was the only time you'd seen their recommendation for off site mitigation, you'd say that probably controls over your memory today?

A I don't think so. I remember very specifically going to that meeting without having any specific contact from the District on a specific additional off site mitigation plan. I'm pretty specific about that.

Q You spoke with Jeff Elledge of the District about the off site mitigation plan?

A At the board meeting, prior to the board meeting.

Q And he told you you could enhance 50

[59]

acres off site through the replacement of a couple of culverts for a couple thousand dollars, correct?

A We didn't get into any real specifics other than there are—there were a couple of potential off site mitigation things that the District would be willing to work with us on. We didn't get into any specifics.

Q You're saying he didn't mention a couple of culverts; didn't mention a couple thousand 10 dollars?

A I don't remember the exact discussion but I'm sure he mentioned culverts and filling in a few ditches. That was about the extent of it.

Q To refresh your recollection, would you turn to page 15 of your deposition, please, and reading the answer starting at line 21 on that page, District staff got with us right immediately before the meeting and said, you know, if you go out and do a little by the of off

site mitigation, go out and do some property we own and replace a couple of culverts, you know, go ahead—we'll go ahead and pass this.

A Yeah, that was basically the— replace culverts on District lands, fill some ditches.

Q I want to—

[60]

A One or the other.

Q Your statement was a couple of culverts, correct?

A That's—my recollection was just they were offering a relatively minimal—go off site, do some additional work on District lands, you know. They were saying it shouldn't be terribly expensive but nobody had an idea what that expense was at that time.

***

[61]

Q And Mr. Koontz was not interested in spending a couple of thousand dollars to resolve this, was he?

A He considered giving up two thirds of his property more than enough. He wasn't happy with the amount that I'd offered under the original application, was upset with—with the mitigation ratio the District was demanding on his property and—

Q My question was, was he willing to pay?

A He was not willing to give anything else at that point.

Q It was a matter of principle for him?

[62]

A Yes, sir.

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Q In your view and you've told the Governing Board that the mitigation ratio that the staff were asking for dealing with this project were excessive in your arguments?

A In my opinion, yes, sir. In my opinion they are still today.

***

[64]

BY MR. CONGDON:

Q Mr. Koontz was trying to sell the property rather than develop it himself, correct?

A That's what I was told, yes, sir.

Q I didn't hear your answer.

A That's what I was told, yes.

Q And was it—did you convey clearly to Mr. Koontz that what you described as the minimal

[65]

cost mitigation would let him have the project that he proposed?

A Well, we didn't consider the mitigation that we offered either minimal or cheap. The on site—

Q I'm talking about the off site mitigation, not—

A Again, we didn't have a—we didn't get into any specifics on how big or how expensive it would be, other

than we were told it would have been a minimal expense. So we didn't get any of the details prior to Coy saying that he wasn't willing to offer anything else.

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[67]

RECROSS EXAMINATION

BY MR. CONGDON:

Q My only follow-up was, in your mind 15 equates with a couple?

A Again, for a minimal restoration project, removing 15 culverts is not a big operation.

Q Right. But when Mr. Elledge told you a couple of culverts, are you now telling the Court that you thought that might be 15 culverts?

A I had no idea how many—what his intents were because we never got into any specifics, other than we said it should be fairly minimal. That was just a last minute offer by the board that we interpreted to protect the legal position for the District.

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[68]

ELIZABETH JOHNSON, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q State your name and your occupation, please, ma'am.

A My name is Elizabeth Johnson and I'm a supervising regulatory scientist with the St. Johns River Water Management District.

Q Ms. Johnson, you've heard the testimony of Mr. Fogle. Were you the environmental specialist who reviewed the application in question?

A Yes.

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[76]

Q Okay. There's no fish here for sure, would you agree with that?

A In the portion of the effected wetland?

Q Yes, ma'am.

A I believe I would agree with that.

***

[77]

Q Well, see, you didn't tell us what wildlife would be displaced. That—that was my concern on this. We know there's no fish. So what

[78]

wildlife was displaced that tied together doing culverts four or five miles away?

A Well, could you re-ask the question, please.

Q What wildlife on this impacted property was benefited by the installation or repair of culverts on a piece of property five or six miles away?

A What specific species are you asking me or are you asking me in general?

Q On this piece of property, how was the wildlife benefited?

A Because species that used this piece of property, five or six miles is not a long way for a bird to fly.

Q I'm trying to be—I'm trying to be serious. You're not suggesting that wildlife on this impacted area is going to cross Highway 50 and this turnpike and travel five miles to where they could put in some new culverts? You're not suggesting that, are you?

A What I'm suggesting is that if it was a bird which can fly and—

Q But you didn't report any birds on your findings. You told us you didn't have any

[79]

particular ones except what Mr. Morgan—

A I don't believe that the District supplied a wildlife survey of the site. I don't believe that we normally do that.

Q So you did not do—okay. You did not do a survey?

A No.

Q Okay. So what you took to Palatka and your people in Palatka made assumptions on was basically what Mr. Morgan had done?

A The decisions that were made were based on the quality of the habitat and the species that would likely utilize that type of habitat.

Q Would likely. They would or would not?

A Since I did not observe any, I can't say that there were certain things using it.

Q Okay. Now, who then made the decision that they needed to do this off site culvert work on the state properties?

A I believe I did.

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[107]

WILLIAM DENNIS, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q Would you state your name and your occupation, please, sir.

A William Michael Dennis. I'm an environmental consultant. I'm president of Breedlove, Dennis and Associates.

Q Very quickly, some of your credentials, please, sir.

A I have a bachelor of science degree from Emory University; master of science degree from the University of South Carolina and a Ph.D degree from

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University of Tennessee and—

Q What is the bottom line, nature of your business?

A We're an environmental consulting firm that practices in the area of wetlands threatening endangered species, water quality, ecology, risk assessment, geographic risk. Basically the natural

area types of studies and how those relate primarily to permitting at the state, federal and local level.

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In this particular instance, this particular property, I believe if you look at the condition of it now and the condition of it in '94, you find that it's been impacted by the roads that have been put all around it. The drainage basin for it's been cutoff.

There's a sizable ditch on the western boundary which takes water from the north of 50 that originally probably flowed wider through this—part of this property and connected on a tributary to the econ and it channeled it right down through this ditch. That ditch under drier times would drain this wetland.

There's a power line right of way that bisects it on the south that's cut it off. And it's—you know, it's in an area that isn't urban—in an urbanizing area.

If you look at the biological indicators on the site to see how wet the wetland gets, that's a key factor is whether or not a wetlands had changes in its hydra period and how wet it gets, how deep the water is and

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how long it stands there.

If you look at those indicators—and those indicators are things like, what plants are growing there; whether or not there's evidence of likens—likens that grow on trees and so forth, whether these go all the way to the ground or not because they can't stand to be flooded. There have been some studies in Florida

here that if you flood them for a week or two weeks it will kill them and create what's called a liken line.

If those likens go all the way to the ground there's other things like swollen linicils (phonetic) on a plant that shows you whether an area gets flooded or not, where the mosses are growing, all of these biological indicators. If you look at all those in total then that gives you a very good indication of how wet the area gets.

If you look at those on this property, you find that it doesn't get wet for very much—over very much of the area north of the power line. I was out there—I forget—a week or two weeks ago, couple weeks ago I guess and

[131]

after all the rain we'd had it still was basically north of the power line or dry site. I didn't have—find any water—any standing water and that was after the rains of July and August we've had.

There was water in the ditch. There was a few puddles of water in some of the ruts in the power line road. But that—that was the only water on the site. So if at this time of year, the wettest part of the year supposedly, in most years, you don't have water there, then all of these functions for wildlife associated with having some standing water you can't have. So, you know, you don't have fish there. That's—everybody's agreed to that, but you don't have these other functions to wildlife that are provided by wetlands that has standing water to some degree or some wetland function.

So I'm not here to tell you that the wetland—that there's not some wetland out there. There's some wetlands out there and they do have some function to wildlife, but it's very very minimal in today's world and I saw no indications that it would have been

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different in 1994.

I looked at this property, in and around it, for the last almost 20 years in permitting projects north and south and east and west of it, all around it and have been in and near it and on it probably looking at other things and I just don't see any indication that other than an abnormal wet or dry series of years that the site would have been much different in '94 than when it—when I saw it a few weeks ago.

So in answer to your question, I think that the rules require us to go and look at those sorts of things, determine the functions the wetland's providing and then come up with some sort of mitigation that offsets those adverse impacts. And in this case it's very very minimal functioning being provided by the wetland.

It is a disturbed site. Some of the area that was identified as wetland is so dry that there's—there were abandon vagrant shelters and camp fires and so forth. I mean, they were in the heart of the area that was identified as wetlands. So it gives you

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some indication of how wet or dry it was.

So I think that's what has to be looked at, and then you look at the mitigations proposed and for the

very minimal amount of impact there, it appears that what was proposed in the application was reasonable.

THE COURT: Okay.

BY MR. JONES:

Q More importantly, Dr. Dennis, the off site mitigation, whatever it may have been, whether it's one culvert or 150 culverts or 50 acres or 2,000 acres, was that off site mitigation necessary to address and or take care of the impact made to the wetlands on this site?

A In my opinion, it wasn't that the—on site mitigation was proposed. Again, considering the functions lost there and how much those that lost was above what just an upland area would have been.

Q What benefits were there in the 11 acres that were going to be dedicated?

A Well, in the mitigation area you've got—you have wetland areas and you've got upland areas and typically when you—when you propose preservation of some area like that the things that

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are important are, one, where is that area located.

I mean, you—just like we talked earlier, you can't take it out of context or in abstract. 11 acres here might be valuable and 11 acres there may be less valuable.

In this instance by preserving that area, you were adding to some mitigation area and a wildlife card that was established on the property to the south, the Waterford Lakes project, originally called Huckleberry

way back when but this is the upper edge or where that—that card or in those preserved areas ties in.

So you're preserving the wetlands that that goes through and you're also preserving some uplands that could be potentially developed by this owner or another owner. And that—you know, that's a value. The more—the more—again, in the abstract, the more area you can buffer and set aside then the more protection you're going to have. The regulatory aspects of that gets down to what's appropriate and what balances because the rules all—they suggest that you have to go through a balancing test and so that's what's required.

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[137]

GRATTEN WHITE, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CONGDON:

Q Good afternoon, Mr. White. Would you please state your name for the Court reporter and your business address.

A Gratten White, 6444 Edgewater Drive, Orlando 32810.

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Q What business are you in?

A I'm in the site work and underground utility business. We also do construction management work.

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[145]

CROSS EXAMINATION

BY MR. JONES:

Q Mr. White, please explain to me, if I am reading this correctly, you went to Hal Scott Preserve and you made a bid to remove one culvert and then a bid for installing another culvert?

A Yes, sir.

Q When you install that other culvert, did that also involve removing a culvert or just the installation of a culvert?

A Just the installation—the bottom cost

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summary is just the installation of a culvert.

Q Okay. Then is it a fair statement that if you combine the two, if you had to remove a culvert and put one in, then price would be approximately $10,000?

A Not necessarily.

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[147]

Q Well, you said you—more particularly you said you looked at nine or ten sites at this place considering the Hal Scott Preserve.

A Yes, sir. To remove a culvert and put another culvert back in?

Q Yes, sir.

A Probably $1,500, less than the total of these two.

Q Okay. So you're talking about $9,000?

A The total is ten, eight or six or nine. Between, yeah, nine—

Q 9,500?

A Right.

Q 9,500, okay. That's to remove a culvert and put a new one in?

A In the same location.

Q Were you asked to do that?

A No.

Q Were you aware that the District had made the statement to Mr. Koontz that within the wetlands in the Hal Scott Preserve existing road systems require the replacement of approximately 15 inoperative or abandoned culverts? Were you aware

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of that?

A No, sir.

Q Well, if there was 15 culverts that had to be replaced according to this option by the --

MR. CONGDON: Objection, your Honor, mischaracterizing the orders as requiring 15 culverts to be replaced.

MR. JONES: Your Honor, I'm reading directly from it.

THE COURT: You're talking about 15 culverts?

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BY MR. JONES:

Q With regard to replacement of 15 culverts, is it a fair statement you're talking

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about 15 times your 9,000 or 9,500?

A Well, if they were all representative of this one location, yes, sir.

Q So you're talking about somewhere between, what, a hundred and $150,000?

A That's about 15 times nine to 9,500, little less than that.

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[160]

CROSS EXAMINATION (William Dennis)

BY MR. CONGDON:

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[161]

Q And would you tell the Judge—indicate the players that were at that table. If you don't remember names that's fine.

A Well, I certainly don't remember all the names. It was a rather large and diverse group that consisted of, as I recall, various representatives of local governments, environmental groups, private sector, individuals. The staff for the committee I believe was—was St. Johns staff

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and they had hired the Center for Wetlands out of the University of Florida as special consultant for it.

Q And the wetlands people from University of Florida prepared a study regarding the econ basin?

A Yes, sir.

Q And basically that study served as the—I'll call it foundation for the rule that came out of this with modifications?

A As I recall, they gathered existing data from the econ basin so they had information from existing databases on things like soils, vegetation, stream and tributary locations and they researched other databases on wildlife, some that related to—that may have related—I don't recall whether the databases were specifically to the econ basin or general wildlife recommendations. Most of them, as I recall, were general wildlife references but they gathered information regarding the basin and the characteristics of it and wildlife that might occur in the basin.

Q And the upshot of all of that was that the District ended up adopting what people call the econ rule, correct?

[163]

A Yes, sir.

[175]

BY MR. CONGDON:

Q What kinds of mitigation are acceptable under the ERP Rules?

A The various forms of mitigation are wetland creation, wetland restoration, wetland enhancement, wetland preservation, upland preservation or purchase of credits in a mitigation bank or in some instances perhaps contribution of funds to some type of ongoing mitigation program.

Q Would you tell the Court the difference between—or describe what creation is, how it's different from enhancement, how that's different from preservation.

A Wetland creation is essentially where you take an upland area and you scrape it down, cut it down, excavate it for the topographic elevation of it and actually create a wetland where there was an upland before. And that can take on a lot of different forms, but that's, in essence, what it is. Wetland restoration is where you take an area that was previously historically a wetland but

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through drainage or some type of site alteration it's not a wetland anymore. It does not fit the wetland definition anymore. And you do some activity—series of activities that would convert the area, restore the area, if you will, back to being a wetland again. So it may be an area that was a wetland and it's been drained and it doesn't meet the hydrology test to be a wetland anymore but it's still got wetland plants, wetland soils and you restore the hydrology on it and it becomes a wetland again. Wetland enhancement is where you take a wetland that has diminished values, perhaps it's been partially drained or it's invaded by weedy or exotic species or has some other kind of pervasion to it and you reverse or remedy what those

adverse conditions were. So you've taken a wetland that may function at 30 percent level and you bring it back to functioning at a 70 percent level or some greater percentage. That's enhancement. Wetland preservation is what it says, you take a wetland in whatever state it's in and you preserve it typically through a placement of conservation easement, restricting future activities in it and its preservation for

[177]

conservation purposes. Upland preservation likewise would be taking an upland area typically associated with wetlands and put in some type of conservation easement, some type of protective mechanism over it so that you protect it from future probations or alterations.

Q For the preservation form of mitigation, if that's what an applicant and environmental agency agree upon, isn't it true that almost always you'll have some sort of deed restriction or conservation easement along with that mitigation to preserve it? That's actually how you preserve it, through a deed restriction, conservation easement or something equivalent?

A Some type of restrictive mechanism, conveyance easements, platting conservation tract, some type of legal designation that would protect its conservation purposes.

Q That's pretty standard?

A Yes, sir.

Q Under the ERP Rule, what are the mitigation ratio for creation mitigation? MR. JONES: Again, your Honor, objection. We don't—it's not an issue.

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Mitigation ratio and creation and preservation has nothing to do with—I mean, it's a good idea if you run out of questions just to ask questions. I mean, that's not germane.

THE COURT: Well, all right. What is the purpose of this line of inquiry?

MR. CONGDON: Well, there's actually two purposes. Number one is, counsel is asking you to find some earlier mitigation was insufficient on this permit denial. Assuming if you were to consider that they would be in the position of trying to get a permit—going back to the District to get a permit under these very ERP Rules that we're discussing. So I think the Court needs to know those parameters. But secondly, the same criteria, the same ratio in the ERP Rule apply back in the underlying permit so the—and I will be glad to establish that after we go through these. I think the answer to the Court's question of how do you get a handle on what the appropriate amount is for these things, so that's why I'm asking him about the ratio

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and I'm actually going to ask him a little by the about this particular property and the ratio.

MR. JONES: Ratios were not mentioned in any orders. They've never been argued. There's nothing in any testimony, depositions, in the pleadings for the past five or six years, number one. Number two, it's not our burden to show that they applied it. We've asked the questions already of their witness and they don't have it, your Honor. Under Dolan it is not our responsibility

to prove the burden. Is it their responsibility. It is their burden of proof. They've got to show that their mitigation was reasonable before they can get here.

THE COURT: I think this line of inquiry could certainly be—could be relevant and in determining that it does sound to me as though this is going along—the way this case is going is a question of—as you just mentioned, one of reasonableness and I'll overrule the objection. Go ahead and ask it.

BY MR. CONGDON:

[180]

Q I believe I was asking you what are the creation ratios under the ERP Rules?

A Under the ERP Rules creation I believe is one and a half to one or two to one, depending on whether it's herbaceous or forested wetland, to five to one, that range.

Q And for one acre of impact, I would like you to explain to the Court what the two—one and a half to two to five, what does that mean in real terms for an acre of impacts? If you wipe out an acre of wetlands how are the ratios—what does that one and a half to two to five mean?

A Well, in the—in the ERP Rules under one of the mitigation sections—and if you give me the rules I can point those out but—

Q That's only fair.

A —they basically—basically give ratios and say that, in terms of guidance for knowing them out of mitigation, the applicant can look at these various ratios. And so for wetland creation if you're going to

create an acre—if you're going to take out an acre of wetland then you might have to put in two acres of creation wetland or up to maybe five acres of wetland creation.

[181]

It depends on the quality of the wetland and the quality of the mitigation creation you're doing and it basically says that—that the wetland—that the ratio guidance they can be higher or lower, depending on the conditions but here's some guidance.

Q So that's creation. What about enhancement? What are the ratios for enhancement in the ERP Rules?

A As I recall—I'm trying to find the section on them. You remember what section it is?

Q 41 to 21, does that sound about right?

THE COURT: It's all right. What is it?

THE WITNESS: I was just trying to find the section in here. It's—

THE COURT: Do you know?

MS. JOHNSON: Section 12.

THE WITNESS: That's what I thought. Right there. Enhancements I believe is four to one to 20 to one. So if you take out an acre of wetland you might have to put back in four acres of created wetlands or 20 acres of created wetlands.

BY MR. CONGDON:

Q Enhancement?

[182]

A Enhancement. I'm sorry.

Q Why is the upper end of the enhancement ratio higher when you compare it to the upper end of the creation ratio; that is, the creation ratio at the upper end is five to one; enhancement ratio is 20 to one, why is there that difference?

A Well, it's supposed to be reflective of the type of mitigation you're doing and I suppose the thought is that if you're creating a wetland, if you're impacting an acre of wetland and then you're creating one or two or five acres of wetlands that you're putting more back than you're taking out and so the ratio is lower. On enhancement you've still got a wetland there, still providing some functioning and what you're doing is just increasing those functions. So the notion is that those ratios need to be higher, plus you don't know—you don't know how much enhancement you're doing. You may be taking a wetland that's functioning at ten percent capacity and increasing it 90 percent capacity. I would argue you wouldn't have to have as many acres of that if you're increasing the value. The mitigation is supposed to be tied back to the functioning that the wetland is serving that

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you're impacting and offsetting those.

Q What's the preservation range of ratios?

A For wetlands it's ten to one to 60 to one.

Q So that would mean for destroying an acre of wetlands, if you're offering preservation as mitigation, the guideline range would be—you would need to offer

ten acres up to 60 acres of preservation to offset the impacts to one acre of wetlands if you're going to be within the guidelines? A Yeah, if you stay within those guidelines. Again, these are strictly guidelines. The rule's clear to point out that they're not requirements.

MS. JOHNSON: It's page 12-34.

THE WITNESS: I was getting there. I appreciate it.

BY MR. CONGDON:

Q And why—again, when you look at the upper end why is preservation 60 to one and creations only five to one? What's the thought there?

A Well, it's a similar thought process, I believe, that if you're preserving wetlands, again,

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you're already dealing with a wetland that's there. It's in reality. And your mitigation efforts, if you will, are to provide protection for it but you're not creating something new. So the—again, it's an attempt to go back to—to some balance of impact to function and positive benefit that you're putting back to compensate for that.

Q And from the ratios preservation it always take more. Whether you're at the high end or the low end, if you choose preservation as your form of ratio, it's going to take more preservation to offset an acre of impacts, if you're using the guidelines, than it will for enhancement mitigation or creation mitigation?

A Typically, yes.

Q If you went to the bottom end of the preservation ratio for the Koontz property and there's 3.4 acres of

wetland impacts, how much preservation would that equal out to if you're going to use only preservation and you're using the ten to one ratio?

MR. JONES: Objection, your Honor. Again, we're calling for speculation. We're not here on this ERP Rule. We're not here on mitigation preservation or creation and we're

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asking questions of a witness they—where we going?

MR. CONGDON: If I may respond, your Honor.

THE COURT: Go ahead. I'll overrule the objection. Go ahead and ask.

THE WITNESS: Given your hypothetical, which is that I must use the ten to one ratio, and I multiply that at the lower end times 3.4 then if my math is correct it would take 34 acres of wetland preservation.

BY MR. CONGDON:

Q And if we went to the upper end of the range that's 60 to one ratio for that 3.4 that would give you?

A It would be 60 times 3.4, whatever that—

Q 204?

A —whatever that turns out to be.

Q All right. So that would be—let's say it's 204, if my calculator's working correctly. So that means if you're at the 60 to one end of the range that would mean you need 204 acres of wetlands preservation to offset the impacts for that one acre?

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A Based on your hypothetical, yes.

Q My hypothetical is, you use those guideline ranges. And for the—for the Koontz property—I'll give you a calculator. I know I couldn't do this in my head.

A You're assuming that I can use it.

Q If you would assume we've been told there's 3.7 acres that he's going to take away through building, so if you're going to offset 3.7 acres with—let's make it 10.5 acres and later I'll show you how we get there with some other exhibits. If you're going to preserve 10.5 acres, 3.7 acres destruction of wetlands, what does that ratio come out to be?

A You want to use 3.7 or 3.4?

Q Well, let's use the 3.7 since he's going to fill that area.

A Okay. Well, it would be 3.7—ten point what?

Q 10.5.

A You're going to impact 3.7 and you're going to put back—

Q Going to preserve 10.5.

A 10.5?

Q Right.

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A Then I'm still not sure I'm understanding what you're asking.

Q I'm asking, if you're going to preserve 10.5, you're going to impact 3.7, what does that ratio turn out to be?

A Little over three to one.

Q So say three to one. And that's below the ten to one guideline by about a third?

A Yes.

Q Let's make that clear. It's a third of the ten to one instead the three to one?

A Yes.

Q I'll steal that calculator back.

A Okay.

Q Back when this particular permit was—the final order was entered in June of 1994, at that time an ERP permit was required and an MSSW—excuse me—a wetland resource management permit or what I always call a dredge and fill permit and an MSSW was required. Is that your understanding of what was required in this case?

A That's—those are the two applications, yes.

Q Right. Okay. And the ERP permit was—that was issued at that time pursuant to Chapter

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403 Florida Statutes?

A The wetland resource.

Q I'm sorry. I said ERP again. Thank you. The wetland resource management permit. And what was

the agency in charge of or who operated under Chapter 403?

A Well, for—there was delegation at that point in time to St. Johns to process what resource permits for development type projects that were required to get MSSW permit.

Q Who was the delegation from, what agency?

A DEP, Department of Environmental Protection.

Q Right. The District was operating this program, in essence, on behalf of DEP?

A For certain types of activities. There was certain types of projects that DEP retained the program and certain types of projects that they delegated to Water Management districts.

Q Do you know who Randy Armstrong was?

A I assume he still is. Yes.

Q He's alive. He was the director—

A I hope he is.

Q He was the director, division of permitting for DEP back in 1988 and you recall him

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being associated with DEP?

A Yes.

Q And Dale Trogman (phonetic), do you remember him as the secretary of DEP?

A Yes.

Q I'd like to—well, first let me ask you—you may not even need look at that—do you recall the preservation ratios that the DEP and the Water Management districts were using back pre-ERP?

A In general.

Q And in general, again, as guidelines, enhancement was four to one to 20 to one and preservation was ten to one actually up to 100 to one back in those days, correct?

A That's my recollection.

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JEFFERY CHURCHILL, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q State your name, your address and your occupation, please, sir.

A George Jeffrey Churchill, 299 Ninth Street North, St. Petersburg. I've been an ecologist doing ecological cutting work mainly in wetlands and wildlife issues last 22, 23 years.

Q Give us a by the of your education.

A Bachelors in biology in from Bucknell University in Pennsylvania and I have a masters in zoology from the University of South Florida.

Q Okay. Are you familiar with the Koontz property?

A Yes, I am.

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Q You've sat here today and heard the testimony, so I'm not going—I'm going to try to be a little brief with you. What were you specifically requested to do with regard to this property?

A I was specifically asked to look at the site and the proposed project plan, its impacts to the wetlands and make an assessment as to whether or not any off site mitigation was necessary to offset impacts to fish and wildlife that would occur on the development site.

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Q Tell the Court a little by the about the site, if you would, and what you determined when you were—first, what you determined the condition of the site was approximately in 1994 and then today.

A Okay. The information that I have about the site in 1994 really comes from the Morgan's Environmental report. I did not have the opportunity to review the site in that time frame. However, upon reviewing the site more currently, it was apparent that many of the things included in his report were still true today. He had mentioned, as an example, the dewatering effect of the ditch on the west side of the property and how that's affected the wetlands to the north of the

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right of way line.

Obviously you've got a situation where you have liken that goes to the ground areas of soil subsidence, places in wetlands area waxed any ground cover. Some

of those were things that he alluded to or mentioned specifically in his report.

Q You heard the Court make some comments about this site as it related to the surrounding areas. And can you explain to the Court how the mitigation that was proposed and the initial permit affected or would mitigate for on site impacts under the proposal that was given to the District.

A Okay. When I looked at the site, in general, the area proposed for impact, which included the mowed maintained right of way underneath the power line and the wetlands areas to the north of that, were essentially fairly impacted area.

They had been isolated essentially from the larger part of the wetlands to the south and east. As I mentioned before, watered to quite a degree, particularly along the west side of the property. They lacked any kind of a diverse understory and portions of it almost completely lacked a mid story. So they're not what I would

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call healthy wetlands and probably would not provide—because they have a lack of variety of habitats and plants and not provide good wildlife habitat.

On the other hand, the wetlands were offered as mitigation farther down in the site showed good evidence of a regular hydra period. There was standing water there up to a foot deep when there's no water in the wetlands proposed for impact on the north end of the site. There's a diverse group of ferns, a

diverse understory indicating variety of habitats available for wildlife usage.

So the concept was that that—and particularly in conjunction with the uplands in the southeast corner of the site, that would provide a greater—you know, sufficient variety of habitats to offset any of the impacts that would occur in the disturbed area in the north.

Q You heard Dr. Dennis's testimony today and read Mr. Morgan's report. The off site mitigation that was proposed by the District and subsequently set forth in the orders, was that mitigation necessary to offset the fish and wildlife impacts to this site?

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A In my opinion, no.

Q And can you tell the Court why?

A Because I think that for the most part there is a minimum of wildlife habitat that occurs in the area proposed for impact to begin with.

Most of it is what I would consider common species. Certainly all of the sign and tracks and stuff that I observed in that area were what I would call common species normally found in suburban areas, even in developed areas. Those types of wildlife, if displaced, will easily be accommodated within the adjacent existing systems.

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Q The surrounding system that you're making reference to, can you point that out to the Court on the aerial we have here and how that system relates to the 11 acres of proposed mitigation

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offered in this case.

A Okay. The site is essentially, in this location, is more or less the area proposed for impact. Here is the north end up from this power line right of way on up to the north. The area that we're proposing to provide as mitigation is essentially the remainder of the site going down this way. It ties into the creek system which basically runs back over this way and ties in on down here.

Essentially what would happen if we came in here and developed the site probably everything that occurs in here is simply going to relocate into the south into that larger area of habitat that is contiguous to other parts of the econ system.

Q When you visited the site, did you observe any wildlife?

A I did observe several birds. There was evidence of raccoons, possums.

Q On the subject area to be impacted or down in the other part?

A Actually the raccoon tracks were within that power line right of way but raccoons are common in urban areas. They seem to do well with

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development, especially if there's food sources easy to get at such as garbage cans and those kind of things.

Q Would they be the type wildlife that would be concerned with impact of this area?

A Probably not. They're going to adapt. They have essentially adapted to development.

Q Okay. The Court asked a question this morning about how does he make that judgment and I guess he has to make that judgment based on the evidence that he hears. So then how do you make that judgment? How do you, as a biologist, make the judgment that that animal habitat has little or no value?

A One of the things you look at is how is—let's say you develop that site. The wildlife species that are there, are you going to have any adverse impacts on their overall populations? Are you going to have a chance of making them go extinct or something?

Several species are adapted to living in and amongst people and it doesn't bother them to live in that type of environment. And the developments that impact those types of species generally do not have an impact—adverse impact

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on the population of these species. They will continue to survive because they're adapted to that type of situation.

Q Did you notice any endangered or threatened species on the property?

A No, I did not.

Q There's nothing mentioned in the record about any endangered—

A Not any of the reports that I've read.

Q Now, the off site mitigation that was proposed and consisted of some alternatives, one being the

enhancement of 50 acres by some ditches and culverts and then some replacement of ditches and culverts, and nothing apparently was specific, but did you get a chance to review that as it may have related to the amount of property that was proposed to be enhanced with the amount of property that was being preserved and determined that that was excessive?

A The acreages talked about, particularly considering the type of impact that was going to occur due to the proposed development, appeared very excessive.

Q What about the—the—assuming that you have—I think, one of the alternatives was a

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Hal Scott Preserve and the other was Dimitri property. Assuming that both of those properties were required as mitigation or even one of them or even one color, would any of that be necessary, do you think, to offset the wildlife impact?

A No, not to offset the wildlife impacts at this project.

Q What about the fish—we've said—we refer to wildlife and I think everybody agrees there's no fish on this property?

A I think certainly within the impact areas.

Q When you observed the property—

A No fish.

Q —in the past couple of weeks, is it wet today?

A Within the areas proposed for impact the only areas that hold standing water or that I've seen

standing water in the last two weeks have been the ruts within the power line right of way. There are some areas down in the south end of the property where you do have quite a by the of standing water in the areas we proposed as part of the mitigation package.

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Q Let me restate it. Okay. Would—in your opinion, would all site mitigation serve any substantial purpose towards the fish impact on this property?

A No.

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Q So you've been on site twice?

A Correct.

Q I'd like you to look at Plaintiff's Exhibit 1A and I believe that you saw evidence of vagabonds when you were out there?

A Yes, I have.

Q And would you come point on the exhibit the locations where you saw those?

A There's one camp that's right here.

Q You're pointing to off the western side of the boundary by some distance not too far from the power line easement?

A Probably 40, 50 feet off the ditch, 30 feet north of the power line easement.

Q You said that was one. Were there any others?

A There were remnants of one up in this corner here.

Q That's the northwest corner?

A Northwest corner of the site. There were remnants of one somewhere near the middle here.

There was a small break in the palmettos.

Q That's in the middle of the proposed impact area?

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A Yes.

THE COURT: That portion of the map that you're pointing to north is over on the right?

THE WITNESS: Yes. He turned this. North is this way.

THE COURT: That's Colonial Drive over there—

THE WITNESS: Yes.

THE COURT:—on the right hand border of the property? All right.

BY MR. CONGDON:

Q And when you were out there, did you notice refuse that had been placed on the property?

A There is some trash and debris that has been put on to the property.

Q In how many locations?

A Mostly on the edges of the power line right of way.

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Q Would you consider this an urbanized site?

A The northern end of it is urbanized because that's the area where there has been a lot of disturbance in the past. It doesn't appear to have been a lot of disturbance to the south of the power right of way until you get near the south end of the site.

Q Would you consider this fragmented, the impact area?

A I would consider it disturbed and it's operated physically from the bulk of the wetland area that ties into the tribute to the econ.

Q So you would say it's not fragmented?

A I would say that the north end of the site represents fragments separate from the south end of the site.

Q Okay. So my question wasn't clear. The proposed impact area you would consider fragmented; the proposed preservation area you would consider not fragmented?

A Correct.

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ELIZABETH JOHNSON ARNOLD, having been previously sworn, testified as follows:

DIRECT EXAMINATION BY MR. CONGDON:

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Q So within your discretion you changed the requirement to affect another 50 acres instead of the 50 acres you initially talked about?

A Well, I don't think the 50 acres on that property were ever specifically identified. I think it was if the applicant enhances 50 acres then I don't think it was—I don't think any specific level of detail—

Q Could have been 50 acres anywhere?

A Absolutely.

Q Absolutely. Why didn't you do this little study before the board meeting and give this information to the applicant so he would understand this?

A I would say that there wasn't enough time.

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Q Well, from the time that you were on the site, did you do any review of the wetland hydro period?

A No, I did not.

Q When you were there with Mr. Morgan did you see any standing water?

A I don't recall.

Q Is there anything the District had put together before the board meeting that would refute the testimony of Dr. Dennis and the other doctor and Mr. Morgan and Mr. Churchill?

A No.

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Q One last area. You were present when Mr. White testified about the culverts?

A Yes.

Q And the two culverts he talked about, if one was installed and the other removed, in your opinion, would that enhance over 50 acres of the wetlands out there on the Hal Scott Preserve?

A Yes, it would.

Q And then had that option been chosen and that work—and they agreed to do that work, would we have been able to issue—the Water Management District been able to issue the permit for the exact project that they wanted?

A Yes.

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MR. JONES: Well, just doesn't work that way, Judge. But in any case, the issue before this Court is, we have accepted the final order and the correctness of that final order and the issue for this Court is to determine that the mitigation set forth in that final order substantially advanced any purpose.

Now, we cited to the Court—and for your review I give you the Agents' (phonetic) case, your Honor, United States Supreme Court, 1980 case, Agents versus City of Timmeron (phonetic), application of zoning law to a particular piece of property effects a taking if the ordinance does not substantially advance a legitimate state interest or denies an owner

economical viable use of the land. And they cite Penn Central versus New York State in that case. This has been cited in every case—every land use case that's been before the United States Supreme Court since 1987. And in particular, in the Nolan case, and the Nolan case is we—what we gave to the Court. This is a 1987 United States Supreme

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Court case again—

THE COURT: Nobody would disagree with that, would they?

MR. JONES: Yes, sir, you did.

THE COURT: Who is disagreeing with it?

MR. JONES: You disagreed with that in the motion in limine he's argued here yesterday. He argued then that day there's only one standard in the State of Florida. There's only one standard is what he keeps saying. Of course, the Statutes say abusive police power. The Florida Statutes—the cases say—the United States Supreme Court says there's two basis for taking. What I'm trying to do is get the Court to the point that you understand—

THE COURT: Understand what?

MR. JONES: The test for determining if there has been a taking. I mean, the law, the United States Supreme Court has set that out.

THE COURT: Okay. There's no economical use of the property or you've got a regulation that's beyond police power?

MR. JONES: Yes, sir. Okay. Now—

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THE COURT: So I don't know. Do you disagree with that?

MR. CONGDON: I don't disagree with that except, your Honor, to the extent that if your regulation's beyond the police power under the Florida constitution you bring that as a due process challenge. Under the Florida constitution they split apart as actually you pointed out, so.

THE COURT: Okay.

MR. JONES: Okay. Now, let me give you the last case under—in Dolan, which is a—came out as a matter of fact, your Honor, about a week after—or two weeks after this final order was entered in this case, the final order entered by the board, and it stated one part of it, under well settled doctrine of unconstitutional conditions the government may not require a person to give up a constitutional right, here the right to receive just compensation, when the property's taken for public use in exchange for a discretionary—and remember the word discretionary—benefit conferred by the government where the benefit sought

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has little or no relationship to the property. Yesterday we had all the testimony. There was no testimony that this off site mitigation had any benefit to the property. The Supreme Court further stated in that case the absence of a nexus left the coastal commission in a position of simply trying to obtain an easement through gimmickry, which converted to a valid regulation of land use into—which converted a valid regulation of land use into an out and out plan of

extortion. Now, that's what we have here in the testimony. And then for the Court's review I have a commentary which is a—from the Real Property Probate and Trust Journal page 451 article by Mr. Pondexter (phonetic). I give it to the Court because it breaks the Dolan case down and it makes it extremely easy to understand the case. And—

THE COURT: I don't—you know, I don't mind reading these, but I haven't heard anything you said yet that I really find challenging. I don't think anybody disagrees

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with what you've said so far. I'm trying to focus on, what is this case—what is this case about? I don't want to make the wrong decision here, decide the wrong issue.

MR. JONES: That's what I'm trying to get to.

THE COURT: What is it?

MR. JONES: Well, as I've told you before—and the most important part of the Dolan case this Court needs to understand, I am the plaintiff in this case, but in the Dolan case it changed the law. The burden of proof under the United States Supreme Court is on the agency; that is, they have to prove—in a two step situation must prove the lack of relationship. It is not the petitioner who must prove the lack of relationship between the conditions and the effect of the development, rather it is the local government that must qualify to the point of rough proportionality, the connection of the action demanded and the effect of the proposed development. That is a two step process under the United States Supreme Court test. That two

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step process involves, first, you have to find the nexus, the essential nexus. There they have to show—they have to show that there was a connection between that off site mitigation and the fish and wildlife impacts on the Koontz property. They have to show that. They have not, not one scintilla, not one shred of evidence, nothing showed that there was a nexus. In fact, the testimony was, well, we had two or three things out there and they were all within our discretion. It was a discretionary benefit to get the property. That's the first step. They did not meet the first step, the nexus. If they had met that they had to show some rough proportionality between the off site and between the amount of the—whether it was in proportion to the amount of damage. You asked them and they couldn't tell you about the degraded property. You have four opinions that are in evidence that the property was degraded; that it had no beneficial use for wildlife and certainly not for fish. They offered nothing

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to refute that, not one single by the of testimony to refute that. They came up and said, well, we could have done this culvert here and a culvert there but by their own testimony if—their order said 15 culverts. So a logical conclusion is that it could be somewhere between two and 15 or it could have been between, as he points out in his—$10,000 or it could have been, as he pointed out, 90 to hundred thousand dollars. What's proportionate there? They didn't tell you that. Not one question that the Fifth District Court of Appeals asked was answered, not one. Asked her, where do you find this in your handbook? It's in there. Where? Well, I don't know. Tell me where you find

that these four people are wrong. Well, I don't know. We go to my supervisor. Your Honor, it is the—there is no evidence under the Supreme Court of the United States that they have got that the off site mitigation provided any benefit. That's the whole question. That's the whole question before this Court. And I'm not

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going to beat it to death.

THE COURT: Well, as I understand it, what you're saying is that the off site mitigation has to be related to this property, right?

MR. JONES: Well, it—no, that's not what the witnesses said. The witnesses—

THE COURT: I'm asking what you're saying.

MR. JONES: The witnesses said that the impact—the impact has to be proven and if that impact—if it was necessary to go off site, then they could possibly do a—under a scientific ratio—there's a case out of New Jersey, I'll cite in a minute, that says you can't do ratios unless there's a scientific basis for it, the amount of the ratio. If they had done a study; if they had done a survey; if they had done anything, which they didn't, nothing, according to their testimony, had they done that they could have gone somewhere else in this basin for mitigation, but they never got past the first step. They never got past the nexus. There's no testimony or evidence that they

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got the nexus. The testimony is that the on site mitigation was more than enough to offset the impacts

of this project. They have the burden of showing, no, that's not correct. We are entitled for more mitigation because of, and that of is still there and there's no connection whatsoever between the requirement and what they required us to do.

THE COURT: I'm still not sure I'm following exactly what you're saying here. Tell me this again. What is the legal principle that you're advancing here that you think I don't understand, because I'm not sure I do understand it.

MR. JONES: Well, that's what's causing me great pain, because you're telling me you don't understand and the thing you don't understand, but—

THE COURT: I'm not sure I understand denial because we did not accept—the permit denial had the conditions in it that were excessive. They were—as the Fifth District said, they were unnecessary. As the that.

MR. JONES: Well, then—

THE COURT: If I'm not sure I understand your argument, I'm going to tell you that, and I'm going to ask you that. If I don't understand a witness I'm going to ask him about it.

MR. JONES: My argument is very simple—

THE COURT: Go ahead.

MR. JONES:—they issued a permit what you're saying.

MR. JONES: Your Honor, you know, I've been before this Court many times. I know this is one of the better courts in the State of Florida and I know that you're one of the

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brightest jurists in the State of Florida

THE COURT: All I want to know is—if I don't understand what you're saying you can count on the fact that I'm going to tell you United States Supreme Court says, they didn't meet the nexus. As the Florida Statutes say, they were excessive use of police power. More appropriately it was an extortion of land that they did not—or something, property that they did not—it was not

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warranted. There's no evidence whatsoever that the off site mitigation was necessary; that there was a nexus between the fish and wildlife impacts on this property and the condition imposed for off site mitigation. There's no evidence to that. And that's what this Court has got to judge, was there evidence to support the plaintiff's claim that there was no evidence or is there evidence to support there was a basis for the mitigation? There is no evidence. They have paraded a bunch of people up here and scientific studies and they did this, did this and showed you surveys. They did nothing, not a thing.

THE COURT: I understand if your argument is simply, look, I've got a—I mean, this case looks, on its face, to be a simple case where a land owner comes in and he says, I want to develop my land. The agency involved here, which happens to be the south—St. Johns River Water Management District, has imposed requirements,

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restrictions, off site expenses that are too great; they're unreasonable. Okay. That's a pretty straightforward case.

MR. JONES: That's it.

THE COURT: But what I'm wondering is, is it that simple or—you keep leading me to believe there's some more esoteric legal argument involved in it than to say—than simply saying this is an unreasonable restraint, unreasonable—

MR. JONES: Unfortunately, your Honor, about 90 percent of the land use cases I get involved in are just that simple.

THE COURT: I'm sure they are. I'd say hundred percent of those that I see are that simple.

MR. JONES: You have—you have a staff level person who makes a decision. Right or wrong, it's upheld. Hundreds of thousands of dollars of time, expense and they're still nine years later—I mean, I find it hard to believe that there's no documents, no studies, no nothing, after nine years of appropriation, but we still don't have a basis in the record to support the off site

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mitigation, not a scintilla of evidence and so for that reason, that is unnecessary exercise of the police power.

THE COURT: But I think I mentioned the other day when you were here on motion in limine that we hear routinely these—circuit judges, that is, hear routinely petitions of writ of certiorari from zoning boards, from the city, the county, the—whoever in which the issue

is, was there—was the action of the—of the zoning—he usual zoning I guess—of the public agency, was it reasonable or not. That's what it comes down to.

MR. JONES: The difference is in that situation you're sitting as an appellate judge over a quasi-judicial body and you're limited to substantial, competent evidence.

THE COURT: I'm limited to the record on appeal.

MR. JONES: That's not the case before you.

THE COURT: That's why we're here.

MR. JONES: Even if you were—

THE COURT: But the issue is the same.

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MR. JONES: Yes, sir.

THE COURT: You're citing all these cases to me and I'm wondering, am I missing something here? Is there some—some test that I don't know about that you're bringing up that I haven't been able to comprehend. That's why I was asking you—

MR. JONES: Well, Mr. Congdon has diverted my attention with this argument about that this should be an administrative hearing and there's some kind of—that I don't have a right to be here because as he argued before, there's no—there's still economical viability use of the property. That's just not the law of the land. That was in 1982 before the environmental movement—20 years ago. Things have changed and everything's changed except the agency mentality. Everything, the law and the statutes, but that's why I addressed those things and I bring to your attention the United States Supreme Court test. Your Honor, I

say this in an abundance of caution, in the Nolan case, for instance, the Nolan case in footnote two states that

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just because you sell your property or you buy a piece of property doesn't mean that you didn't—the constitutional rights didn't go with the property. That was in 1987. That has been litigated a hundred times, a thousand times since then and they're saying, no, because—and all over agencies are saying—California's saying—finally it goes back to the Supreme Court just this past thing in the Palazello (phonetic) case and the Court had to come back again and say, look, in 1987 we told you that—in a footnote we gave you that answer. So what I'm telling this Court is—I'm arguing this for the record—

THE COURT: What answer?

MR. JONES: The Supreme Court told the agencies, the government, again that they gave them the answer to that in 1987.

THE COURT: What's the answer—what's the question and what's the answer?

MR. JONES: Your constitutional rights go with the property. Whether you buy—if I buy your property I don't get the constitutional rights that you had on that

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property, they follow me. And I bring that up only because the agencies and the government tend to do what they want to do. They disregard the law, the Supreme Court, and that's why I give you the Supreme Court law. You're absolutely correct. You're absolutely correct when you asked that question the other day. A

taking, we've had inverse condemnation forever, forever. All of the sudden it's a big thing. In the past 20 years or since 1987 it's become a big deal because the Supreme Court said, you didn't have a regulatory taking and now they try to equate all inverse condemnation with regulatory taking and it's not because for a long time—It goes back to abuse of police power. You grade—the county grades on to your property, I mean that's a taking. It's a police power. And it's not necessarily regulations. But it's been so much confusion in this field of regulatory taking, permit taking, same thing. It's the same—did they go too

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far? That's one of the cases, does it go too far? And in this case there's no basis for it. It's plain and simple abuse of the police power. And I don't know that it's an abuse of police power, I think it's just absolute, what the hell, we'll do it anyway. I mean, there's nothing malicious about this. I don't say this is extortion. I mean, the Supreme Court did, but this is just one of these deals, you want a permit, we want to get all we can get and at some—some point in time somebody's got to draw the line in the sand. Mr. Koontz did that, that's why we're here today. We're here to ask you if he was correct when he drew the line in the sand.

THE COURT: All right.

MR. CONGDON: I'm not really sure of Mr. Jones—what his argument is either. There's the simple view that he's asking the Court just to determine that the on site mitigation was enough for issuance of the permit.

THE COURT: I think his argument is that the total package was unreasonable; that

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there is no—there's no justification for the off site mitigation under the circumstances of this case. There for a while I thought he was arguing that you couldn't get off site mitigation. That was what was puzzling me, was that it was not permissible for off site mitigation. Unfortunately, that's one of the reasons I was asking to clarify it because I don't think he is arguing that. You're not, are you?

MR. JONES: No, sir.

MR. CONGDON: Okay. So in—

THE COURT: You're saying it's unreasonable that they—under the circumstances of this case that that property, these requirements, these restrictions are unlawful restraints on the property rights of the owner?

MR. CONGDON: And I would say, okay, we're here on a taking's claim and ordinarily a plaintiff stands up and says—the state ends up getting property and the state ends up giving money to the applicant. And there's—I have no idea what property he

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thinks the state is getting. When this is all over, he's asking you to tell him to pay money for something. I think one issue is, what property are we talking about? And that's why I think this really is—

THE COURT: Well, let's don't get—I don't want to get off into confusing distinctions. This is one of the things that I'm trying to do is to—you wouldn't question the

fact that the zoning board, the building requirements or whatever could impose restraints on the use of property such that it would amount to a taking and you don't.

MR. CONGDON: I agree with you.

THE COURT: So we're not sitting around saying, well, what—we're not trying to make some analysis of how many sticks are in the bundle of sticks of ownership or, you know, which stick is which and how many is—can be taken and all that. And that doesn't—the question is, does the restraint take away the economic use of the property?

MR. CONGDON: Exactly.

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THE COURT: Or does it take away, in exchange for the use of the property, an unreasonable price? Does it take away from the property that has to be dedicated to public use and the off site mitigation, is that an unreasonable price?

MR. CONGDON: And I would agree with the Court, that if you're looking—when you look at the price, you look at the total package we end up with, there's either a taking or not. Does it deny substantially all reasonable beneficial use of the property and I agree that is the standard.

THE COURT: Now, wait a minute. There's an ambiguity in that. You can still have some economically viable use of the property but if the restraints placed on it are so great that they are excessive, they are unreasonable and then that could be a taking also, couldn't it?

MR. CONGDON: I would say no, unless you tie it to economics.

THE COURT: I'm talking about the use of property, yeah. What are you talking about?

MR. CONGDON: I'm talking about tying it

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to economics and I think Mr. Jones's theory is, this has nothing to do with economics. His—all he—he introduced no evidence on economics. He's not interested in economics. He's said in our stipulation, I'm not saying you've taken substantially all the economics or beneficial use of my property.

He's saying, you have taken the property, because in this denial of a permit, when you told me that I could get a permit if I was to enhance 50 acres off site, that by putting that statement in a denial of my permit, that is a taking. And that's where this case, to me, is so unusual because he's taken it completely away from the economics and he said, this case is about whether the Court should decide whether the on site mitigation was sufficient to allow him to get a permit to fill 3.7 acres of his property.

THE COURT: Again, I don't want to decide the wrong thing here. I think one of the risks that judges have to guard against, whether you make the right decision or not, you ought to at least try to decide the right issue, rightly or wrongly. I'm not sure I'm

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following this. As I understand listening to Mike Jones this morning, I think what he's saying is that the—there is no evidence that the off site mitigation

is—is anything but arbitrary, if you want to use that language. That it's unreasonable. It doesn't have any relationship in anything and it's undefined—

MR. CONGDON: That—

THE COURT:—that it's just—is that right? Is that what you're saying?

MR. JONES: Yes, sir.

THE COURT: Because—I'm trying to—I'm not arguing—I'm not trying to argue your case for you or against you. I want to be sure I'm deciding the right issue.

MR. JONES: That is the issue and Bill fails to understand that everything's economics.

THE COURT: Well, I was going to say the same thing. I don't know what else it would be. If I'm not talking about economics, what am I talking about? I'm not talking about counting—you know, counting wildlife. I

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could be, I guess, but there's no evidence of that. Or not counting square feet. I mean, part of his argument is that, look, the way this is set up it might be—the off site mitigation might be $5,000; it might be $105,000. We don't know how much it is.

MR. CONGDON: Let's put aside the off site mitigation for a moment . Just put it aside. Paragraph 19 in the final orders say—Ms. Johnson talked about it—you can develop an acre of your property in exchange for a conservation easement over right there. He's got a reasonable beneficial use of his property right there. Right in the final order it says, you can develop an acre

of your property. There's no evidence that that substantially deprives him of all the economic use of his property. So right there that takes care—

THE COURT: Let's stop on that. When Mike Jones argued—I wanted to ask about that—are you saying that that's—that is depriving him of substantially all of the economic use of his property to use just one acre?

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MR. JONES: No, sir. That has been our argument all along, that there are two prongs under the Agents' test that—we are not saying—and I think there's some case law out there now. They're going more towards diminution value than they are all use, but in any case, there's one acre there and it could be used. And I had one agency tell me you could put a tent on it and a boardwalk. So that—there is still economical beneficial use on that property greatly diminished. You're talking one acre versus three acres but there is use. That is not our issue. I'm not arguing that with this.

THE COURT: Why isn't it? I mean, if the question is, is he being deprived of substantially all of the economic use—and I can think—I can see certainly a case whereas you pointed out they may leave a corner where you can set up a fruit stand and take the rest of your property and that would be substantially depriving the owner substantially all the economic use of his property.

MR. JONES: Possible.

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THE COURT: Is that your argument? I mean, they did leave an acre—

MR. JONES: I think really—if you really—if you want to use Bill's argument, that paragraph 19 gave us a one acre use of the property for what we had offered in mitigation, then you'd have to say that the off site mitigation took all economical viable use of the other two acres that we had proposed to use, but that—we're taking—you have to take the parcel as a whole and that's why the condition—the off site mitigation did not—is not roughly proportionate to the taking of that two acres, and that's what they're doing and they're tying that off site mitigation to the two acres. That's really all way way off the point. The point is, did they have—is there any—have they met the burden that the off site mitigation was required for the development of this property that was impacted, and they have not.

THE COURT: Okay.

MR. CONGDON: So let's—I'll kind of

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start at your traditional taking case and then I'll try to move into what I think Mike Jones—I think maybe you hit it, the arbitrary and capricious aspect of this.

THE COURT: I'm just picking words, so I don't want to, you know—

MR. CONGDON: I'm as puzzled as you are, your Honor. I'm more puzzled and I've been living with this case. If there were cases out there like this, we'd be citing them to you. We'd argue why they're distinction or not distinction. This is—

THE COURT: What's unusual about this case if the argument is, as I keep coming back to saying, that the—let's put it down to—let's bring it down to the off

site mitigation. There is simply no evidence that the off site mitigation is reasonable—

MR. CONGDON: All right. Let's look at that—

THE COURT:—has any relationship to anything.

MR. CONGDON: All right. Let's look at that. Let's say that that's the case. Then I'll back up and we get into our ratios to

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show you why it does have relationship. And I think the—kind of the key to the case, that is what Mr. Fogle, the engineer for the applicant, told the Governing Board back in 1994. He says the mitigation ratios that staff are asking or dealing with, what we consider reclaiming here are excessive in our argument. That's at page 24. So what we have, what this boils down to is the mitigation ratios. He thinks they're excessive. What Mr. Jones is saying, he's saying, even though the standard is ten, that's the—I won't say standard—the guideline—the bottom of the range is ten. Mr. Jones is saying it should have been three to one in this case. We'll preserve three quarters of the property if you let us wipe out one quarter. They're saying that's the correct ratio. And the Governing Board made an executive branch type decision—and when you think about it, if everyone was able to preserve three acres of wetlands for destroying one acre of wetlands that's a net reduction of 25 percent of the wetlands. You

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get to destroy one if you save three that are already there. You carry that out and you have a 25 percent net reduction of wetlands in the econ basin. We have a

special rule. We had a task force to the government agency involved that sets the policy. That's not good public policy. They say we need more, a better ratio. If you're going to destroy one we want to preserve ten, so that if we lose on at—at least ten—if we lose one acre and preserve ten acres that's a ten percent loss in wetlands. The government agency has said that's our policy choice; that that would be an acceptable loss of wetlands. What Mr. Jones is here saying, he's asking the Court to override that policy choice and to say, no, I think a three to one ratio is appropriate on this site. And if the question is whether the government action was arbitrary or capricious, it clearly wasn't. We were right near—we were at 13, near the bottom of the ten to 60 range for

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preservation. We were down about as low as you could go and still said, it's not enough on site to effectuate the policy of protecting wetlands. Mr. Jones is asking the Court to say, government can't make that choice; that this—government, if they're within their guidelines, that's irrelevant to the Court; that what the Court should tell the agency—this is what he's asking you to do, is to say, agency, I think that 25 percent loss of wetlands is okay for this site and any similar sites, because we have to treat everybody the same. So the net effect is that anytime someone can bring in an expert to say, I think the value of this wetland is lower then the Court would be obligated, if you believe that expert, to say this isn't a government decision, this is a completely new decision on what's appropriate based upon what battling experts say. And we can't have a case by case regulatory program that would work like that, that's why this is—it's a government

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executive branch decision that says, let's set some guidelines. How do we want to try to deal with this basin in particular, these wetlands in general, how do we want to come to accommodate a certain amount of development, with protection of the wetlands. So the test for the substantive due process is whether the decision was arbitrary and capricious. If it's not then it does bear a legitimate relation to the state interest. And how can a decision be arbitrary and capricious when it's within the guidelines that are established by the rules and the interpretation of the rules? So this isn't an arbitrary and capricious decision and that is what—the only thing I can think of if he—Mr. Jones came here under a substantive due process type challenge—which, by the way, he brought earlier and they were dismissed—that would be the issue for the Court under substantive due process. It would be, is this an arbitrary and capricious decision? Is it based on whim? And we're looking back to '94.

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There's—there's the guidelines. We were able to show reconstructing not—people don't have memories out thousands of permit applications; pull one out and say, okay, I know exactly what I did on this one. I mean, that's just—that's not the fact. The fact is that we can go back and say, these are the ratios that were in the rules; these are the ratios that were in the guidelines; these are the ratios we were using, I can calculate based on the final order, it falls within the ratio. So we applied to this property what we would apply to any other property. That's not arbitrary and capricious to follow the rules. So on your usual substantive due process this isn't an arbitrary and capricious decision.

I think Mr. Jones is saying, well, this is different than substantive due process. He's arguing to the Court that under Nolan and Dolan the state—the Water Management District must show nexus and rough proportionality. If they want to deny my permit, the state must show why and that they are suggesting the solution have a nexus in

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rough proportionality.

THE COURT: He is saying that.

MR. CONGDON: That is a misreading of Nolan and Dolan and, you know, I—both of us can take a case and say—

THE COURT: The devil can cite scripture for his own purpose. You can cite a case and usually do cite the same cases.

MR. CONGDON: Here Nolan and Dolan has been interpreted by a bunch of cases. I can provide the Court with a memorandum. In fact, I will afterwards if the Court doesn't want us to actually brief the issue. I think in all fairness to the Court if the parties were to brief you can tell us, I want your analysis of the law on these issues. Then we bring to you a case law analysis rather than one lawyer standing up and saying this; me saying I respectfully disagree and you can make a more reasoned decision, but I'll say, this Nolan and Dolan deal with when—as a condition of a permit, not a denial, a condition of a permit you say the public has access to your property. Okay.

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And there I'd have to say that makes sense to me. If the government is going to effect a physical invasion of your property, is going to take away your right to exclude the public from your property as a condition of a permit, then the government needs to justify, why are you doing that. In the Nolan case it was a beach access, you know, which I think was a good thing, but it really wasn't related. Somebody wants to build a house to offset your office, you got to let people walk by. There was no relationship there between the two and that was a physical invasion. The same was in the Dolan case, a bike path and people walk down the flood plain that was part of this property and the Court said, if you're going to require to let people on your property then we're going to go to a stricter analysis. And I don't debate that. That is what those cases stand for and that's how they've been interpreted. This case doesn't involve letting anybody go on the property. This is your classic, I disagree with the agency decision;

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I don't want to follow Chapter 120, as I'm told, through the administrative process. What I want to do is try to come to circuit court, tell the judge, Judge, this other federal law has overruled Florida Statutes, Chapter 120, which tells me how I resolve these problems and ask the Court to make that decision instead. And, by the way, call it a takings to give compensation. The Florida Statutes are set up so that in the administrative proceeding a different answer could come out where we wouldn't have to come to circuit court and argue all of the money that's involved in takings cases, but we're here and what the final order

says, you can develop one acre of your property. The plaintiff has shown no substantial economic loss based on that. In fact, I'd like to point to the Court on Exhibit Number 9 one of the witnesses testified about a gas station put in right next door. Okay. So somebody thought a gas station was economically viable in that location. We don't have anything on the acreage of it. A smaller gas station, who

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knows. They've not gone there. T hey've not suggested that it's diminished the economic value. Mr. Jones's argument is strictly, we need to have some sort of de novo hearing here of what happened eight years ago and ask you to say—to judge environmental law 8 based on experts that come into your courtroom today from nine years ago. And I think that's a very significant point, because I was racking my brains last night thinking, why are we getting these differences and something Paul said yesterday when he was a witness, he said we designed it so that DOT was required to maintain this ditch. I was scratching my head saying, well, why did the plaintiff's expert and Ms. Johnson, when they were out there, say the whole piece of property was wetlands and now the plaintiff's experts today, who's been out in the last couple weeks, are saying, no, it's dried up over here; it's dried up down here on these portions next to the ditch.

I'm thinking, maybe DOT came in and

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maintained the ditch. Maybe the ditch is draining them. Something's changed. So Mr. Jones is arguing, well, Judge, since today we've got much less wetlands out there, this value is terrible and so you ought to look

back in time and say, in 1994 when the District made its decision based on what their applicant submitted, and Ms. Johnson's agreement, that somehow the District's decision was wrong. And it just—I don't think that's the way our system is set up, to come in with changed conditions and say we want you to relate back, say, the Governing Board should have known our consultant was wrong and then pay them money for it.

That's really what this case boils down to. And that's why we have the administrative process that they—if they really disagreed back then they should have gone into that administrative process, had the experts disagree there and resolved it back then. Now we're trying to have a takings case, second guessing changed circumstances due to

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a ditch. And, your Honor, I submit that's not takings, particularly under Florida law because the Keyhaven case, it's progeny, several of those cases have involved Mr. Jones and in each of those cases the Burgess case, the Sadalaro case, the Yule case, the courts have told—the Yule case was a year ago—if you don't follow 120, you must accept the correctness of the agency decisions.

Mr. Jones cited 253 to you or 200 statute—

THE COURT: 253.763.

MR. CONGDON: I wanted to correct him and he told me to sit down. That doesn't apply to Water Management Districts.

THE COURT: You're taking about 373.

MR. CONGDON: Right. It's essentially the same thing—

THE COURT: I thought that's what you were referring to, because the language is almost identical.

MR. CONGDON: Yeah, it is identical. The Supreme Court in the Bohen (phonetic) case, it was cited in my motion in limine,

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has interpreted the 200 statute, identical to 373, to say, you don't challenge the propriety, the correctness in circuit court under this provision either. That's what 120's for. The circuit court decision under that statute is to determine whether there has been a taking and a taking has denied all or substantially all economic or beneficial use of the property. And touching upon that point, this part of the property was condemned. Mr. Koontz received $403,000 for it. Documents I put in evidence were from the circuit court here. In the registry, out of the registry. So he's received 400,000 for part of the property. We have an appraisal for developing the 3.7. It would be over $450,000, when you include the off site mitigation costs of $10,000 and the cost of filling this, that's—so that's about—that's over $800,000 that he's come out of this piece of property. And that's why they're saying this doesn't have anything to do—this decision doesn't

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have anything to do with economics; it's strictly a question of, has government asked for too much and I submit in a takings case that is not the issue. You have to accept the correctness of the government decision when you come into circuit court in a takings

case, as the case law holds. Then the Court decision is, okay, now let's look at the economic effect on this. Bring on your appraisers, let's see what's the real dollar effect and has the government taken so much value out of that that I think it's unreasonable. It comes down to the dollars and cents, the unreasonableness of the government action in a takings case. If you want to challenge it as arbitrary and capricious, that's a due process claim under a different provision of the constitution—Florida constitution not at issue here. If you want to challenge the nuts and bolts of it, you go Chapter 120. We've got a system set up and it allows government agencies to regulate development in a consistent way across the state. That's why

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the system's set up that way. Under Mr. Jones's theory, he doesn't like that. He wants to come into circuit court and say to you, well, Judge, here's what I think we ought to do in this area for this piece of property and if you do that for every piece of property, imagine every land owner who's coming into development having a trial on whether it's reasonable or not. Then you have an unbelievable hodgepodge of land use decisions. It takes it out of executive branch and puts it strictly in the Court and that's why all of those cases say, you go 120. There's a statutory procedure the legislature set up to determine the issues that Mr. Jones is asking you to determine here. So I think the evidence—when you look at all of the evidence this isn't a diminution value case. Mr. Jones concedes as much. He sort of concedes that he has to accept the correctness of the agency's decision. He said

that in his memorandum of law to you and his trial brief and even in

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his statement here he said, we accept the correctness of the decision but we want you to say it's incorrect. And you can't have it both ways. If the decision is correct then like in all takings cases we should be looking at what's the economic impact. If he's saying that decision is not correct it's too much mitigation, then that's a different issue that's at most in circuit court a due process issue which the standard is arbitrary and capricious or when you're—you could say, is it designed to promote public safety or welfare and have a reasonable relationship to achieving the law's purpose? Mitigation has to have a reasonable relationship. Now, you can argue, is the amount right or is the amount wrong, but that's not a constitutional question. That's a much lower level question for the 120 process. So Mr. Jones is trying, I think, to get the Court to look at something that has never before been held to be a constitutional level violation, that the government, based on the submittals of their—their submittals say

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the whole property's wetlands is now trying to come back and say they shouldn't have believed that; they should have known that our consultant was wrong and we want you to find a constitutional violation because of that, and I just I don't see it, your Honor.

MR. JONES: Very quick retort, your Honor.

THE COURT: Sure.

MR. JONES: I don't know where my friend Bill's coming from. I told you at the last hearing and yesterday and today, we understand we have to accept the correctness of the decision. We're not asking this Court to change the policies of the Water Management District. We're not asking this Court to change the mitigation ratios. We're not asking this Court to say that we have too much—a 50 acre enhancement on this site. We're not asking you to say that that decision is incorrect. What we're asking you to determine is, did they have evidence back—factual background to support that decision. That's all we ask. Whatever that decision was,

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whether it was 50 acres or hundred acres or a thousand acres—as I asked Dr. Dennis yesterday, doesn't make any difference how many, two acres or 200 acres, two culverts or a hundred culverts, did it substantially advance the purpose of the impact on that property, and the answer to that was, no, it was not necessary. They're correct.

I mean, how can you argue with that. You pointed that out at the hearing before. Also, this is not an arbitrary, capricious claim. This is a simple—as you just pointed out, a simple issue taking. It is a constitutional challenge. Contrary to what Mr. Congdon has said about ten times here, we're out here to get this money, we haven't asked for a dime.

THE COURT: What exactly are you asking for?

MR. JONES: Well, your Honor, he pointed out—I pointed out 257 I guess it was or 276, whatever—

THE COURT: It was 373.672.

MR. JONES: It's the same thing and that's exactly what—it's up to the

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District. If the District wants to pay the money then the District can pay the money. I f the District wants to change the conditions on the permit, they can change the conditions on the permit. It's not up to us. You can direct us the District to do what—

THE COURT: You're saying that—that the mitigation required is—I use the word arbitrary, and I suppose—well, it's arbitrary in the sense that it is without any evidentiary—it was without any scientific basis, without any basis whatsoever is your argument—

MR. JONES: Yes, sir.

THE COURT:—is that right?

MR. JONES: Yes, sir.

THE COURT: And, therefore, it is a—it is—

MR. JONES: An abuse of the police power.

THE COURT: Yeah, and it's—it is arbitrary for that reason, because it's not supported by anything?

MR. JONES: That's correct.

THE COURT: And, of course, he's saying,

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well, we've got these ratios and it's supported by the ratios, and the ratios are –

MR. JONES: There was no evidence of ratios presented. There was talk about maybe we should and shouldn't.

THE COURT: After the fact.

MR. JONES: That's correct.

THE COURT: That these ratios—this is how it fits within the ratios.

MR. JONES: That's all it was. It was an afterthought and I'm telling you—

THE COURT: I don't want to agree it was an afterthought, but it may or may not be, but it was—as Bill Congdon says, it's the—they don't remember everything they did at the time eight years ago or nine years ago and that they come in and say, well, this is consistent with our ratios. What if it were; what if that's what they base it on?

MR. JONES: There's no evidence they did.

THE COURT: What if they did?

MR. JONES: Well—

THE COURT: They presented evidence—

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MR. JONES: Let me see what the Court says about, that is that—

THE COURT: What court?

MR. JONES: This is the Superior Court of New Jersey. This is a 1990 case, 241 New Jersey 145, 574 Atlantic Second, 514. And it says—it refers to their act in New Jersey, but it says, the purposes of the Freshwater Wetlands Protection Act was not supported by—for

purposes of the—excuse me. Scratch that. The rebuttal of presumption of regulation and fix the acreage ratio of seven to one of enhancement to replace each wetland acre lost or disturbed would mitigate adverse environmental impacts on wetlands for purposes of Freshwater Wetlands Protection Act was not supported by scientific basis. Until some enhancement ratio was scientifically validated as fixed or presumptive standard site, specific ratios would have to be used in determining enhancement that would be required to protect wetlands. That's exactly what we have here.

THE COURT: You're saying it has to be site specific?

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MR. JONES: That's what Dr. Dennis said. That's what the four experts said. That's what their rule is. The District wants to go out—the District and the DEP, they want to go out and make you give them ten acres for every acre you impact and they acknowledge and everybody understands some wetlands don't have the value other wetlands have, but that doesn't make any difference to them. We still want ten for one or a hundred for one.

THE COURT: That isn't what the witness said, Mrs. Johnson-Arnold. She said they took that into account.

MR. JONES: Well, if you remember, you asked her about that. Did you consider this and she said it was a pristine wetland. Well, there's no testimony to support that. She doesn't remember being on there. She's reading a report but there's four people been out there recently and say it's not, it's degrading. So, I mean, you got to balance the evidence. There is no

evidence. They submitted no evidence to show it was pristine.

THE COURT: What I said is, they did

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take—she testified that they did take into that—it was the policy to take into account the nature of the—of the wetlands. Some wetland was more valuable than others.

MR. JONES: Well, but there's no evidence they did that in this case. Now we go back to the whole thing, yes, okay, that's your policy. Yes, what you did was correct under all your policies and procedures, and can you still—as I cited to the Supreme Court, I just read a portion here. I mean, you can have valid regulation and still have a taking; you can have a correct decision, correct permit decision, and still have a taking.

And, your Honor, I leave it with one thing, the Supreme Court—I think it's important the Court understand this. Hereby—the Supreme Court says in a footnote eight, hereby contrast, the city made an adjudicative decision to condition the permit application for a building permit on an individual parcel in that situation the burden rests on the city. That's what we have here. They made the

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decision on this individual parcel. We're not talking about down the street or collective area or in the basin and all this. That's what she said, her basin was the basis—the econ basin was the basis for this ten to one or 20 to one, whatever they use, ratio, but not on this specific piece of property. That's what this says, on this individual parcel. They had nothing on this

individual parcel and that's—the law is clear, they did not carry the burden for that. And they didn't carry it in 1994.

Thank you, your Honor.

THE COURT: I think rather than to say that I want you to submit briefs to me on some specific issue, I don't want to make this—I don't want to make this too difficult and, you know, run up your costs and your client's costs too much. I would really like to look at a proposed judgment—a proposed final judgment and see how much of it I could agree with and how much I ould disagree with, see how much I do disagree with. You know, I really hesitate to ask you

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to do that because it's time consuming and expensive and—but I suppose—maybe you have—well, how difficult is that to submit a proposal?

MR. JONES: Your Honor, I just received—he keeps throwing up the Yule case. We just received a decision from Judge Alley. She has found a permanent taking. The case he refers to had to do with a temporary taking. Judge Alley now says it's a permanent taking and she gave me a three page opinion letter what her findings were and then she told me to draft the final judgment based on that.

And the other case we had here, Judge Fifer asked me to draft a judgment for him. By the time I drafted the judgment it really becomes—it really is what the administrative judges do, both of you give me an opinion; I'll pick out one of them. I like to know from my—for me in drafting it what the Court feels. If you have an opinion—

THE COURT: I have never—I have never ever accepted a—well, I shouldn't say

[343]

that. I have—a lot of time people daw up judgments but I have never written an opinion based on a form proposed by the attorneys. I always look at them as a point of departure to see what I can agree with and what I can't and what I don't.

MR. JONES: I have difficulty when I start to draw one. It is the finding of this Court—well, hell, I don't know what the finding of this Court is.

THE COURT: I don't mind that.

MR. JONES: What about us just presenting our position.

THE COURT: I think the findings are important because that gives me an idea, well, from your point of view what findings do I need to make to reach the conclusion that you think I ought to reach, and that tells me more about

***

IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

COY A. KOONTZ, FILED JUNE 18, 2004

Plaintiff,

Case No.: CI-94-5673

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Defendants.

_____/

FINAL JUDGMENT

THIS CAUSE comes before this court on the entry of a final judgment, contemplated by the predecessor judge who entered a Final Judgment upon the conclusion of the liability of trial in favor of the plaintiff, finding that the District's 1994 Final Order requiring Plaintiff to provide off-site mitigation in addition to on-site preservation of property was an unreasonable exercise of police power constituting a regulatory taking without just compensation. A copy of the predecessor judge's Final Judgment is attached hereto as Exhibit "A" and is incorporated herein by reference. An appeal of that Final Judgment was dismissed for lack of jurisdiction because it was premature. The Appellate Court held that the Final Judgment was not a final judgment because it was one that contemplated further judicial labor because the trial court remanded the matter to the District for further action pursuant to Section 373.617(3), Florida Statutes, *St. Johns River Water Management District v. Koontz*, 861 So.2d 1267, 1268 (Fla. 5th DCA 2003).

On remand, from the Fifth DCA to the District, the Governing Board agreed to issue a permit authorizing the 3.7 acre development project Koontz originally proposed, with the only mitigation being the on-site preservation of the property, Koontz originally proposed preservation mitigation, as described in the District's June 1994 Final Order. A copy of the Governing Board's 2004 Proposed Order is attached hereto as Exhibit "B" and incorporated herein by reference.

The Court approves the District's 2004 Proposed Order pursuant to Section 373.617(4), Florida Statutes. The Court finds that the issuance of the permit for which Koontz originally proposed the preservation mitigation, is a reasonable exercise of police power that does not constitute a taking without just compensation, since Koontz would be able to pursue the 3.7 acre development requested in the original permit application. Accordingly, it is ordered and adjudged:

1. That Defendant, St. Johns River Water Management District, shall, within thirty (30) days from rendition of this final judgment, issue the appropriate permit authorization for the 3.7 acre development project Koontz originally proposed, as set forth in the District's 2004 order.

2. Subject to the appeal of the taking issue, this Court reserves jurisdiction to determine the taking damages.

3 The Court reserves jurisdiction for the award of attorneys fees and costs, as applicable.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this ___ day of June, 2004, for which let execution issue.

/s/ Theotis Bronson
Theotis Bronson
Circuit Court Judge JUN 16 2004

Copies to:
William H. Congdon, Jr., Esquire
Michael D. Jones, Esquire

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT
JANUARY TERM 2009

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Appellant,

v. CASE NO. 5d06-1116

COY A. KOONTZ, JR., ETC.,

Appellee

_____/

Opinion filed March 20, 2009

Appeal from the Circuit Court
For Orange County,
Joseph P. Baker, Judge.

William H. Congdon, Palatka,
for Appellant.

Christopher V. Carlyle, Shannon
McLin Carlyle and Gilbert S.
Goshorn, Jr., of The Carlyle
Appellate Law Firm, The
Villages, and Michael D.
Jones of Michael D. Jones
& Associates, P.A.,
Winter Park, for Appellee.

ON MOTION FOR CERTIFICATION

PER CURIAM.

Upon our consideration of Appellee's Motion for Certification, we grant the motion and certify the

following question the Florida Supreme Court as one of great public importance:

> WHERE A LANDOWNER CONCEDES THAT PERMIT DENIAL DID NOT DEPRIVE HIM OF ALL OR SUBSTANTIALLY ALL ECONOMICALLY VIABLE USE OF THE PROPERTY, DOES ARTICLE X, SECTION 6(a) OF THE FLORIDA CONSTITUTION RECOGNIZE AN EXACTION TAKING UNDER THE HOLDINGS OF *NOLLAN*[1] AND *DOLAN*[2] WHERE, INSTEAD OF A COMPELLED DEDICATION OF REAL PROPERTY TO PUBLIC USE, THE EXACTION IS A CONDITION FOR PERMIT APPROVAL THAT THE CIRCUIT COURT FINDS UNREASONABLE?

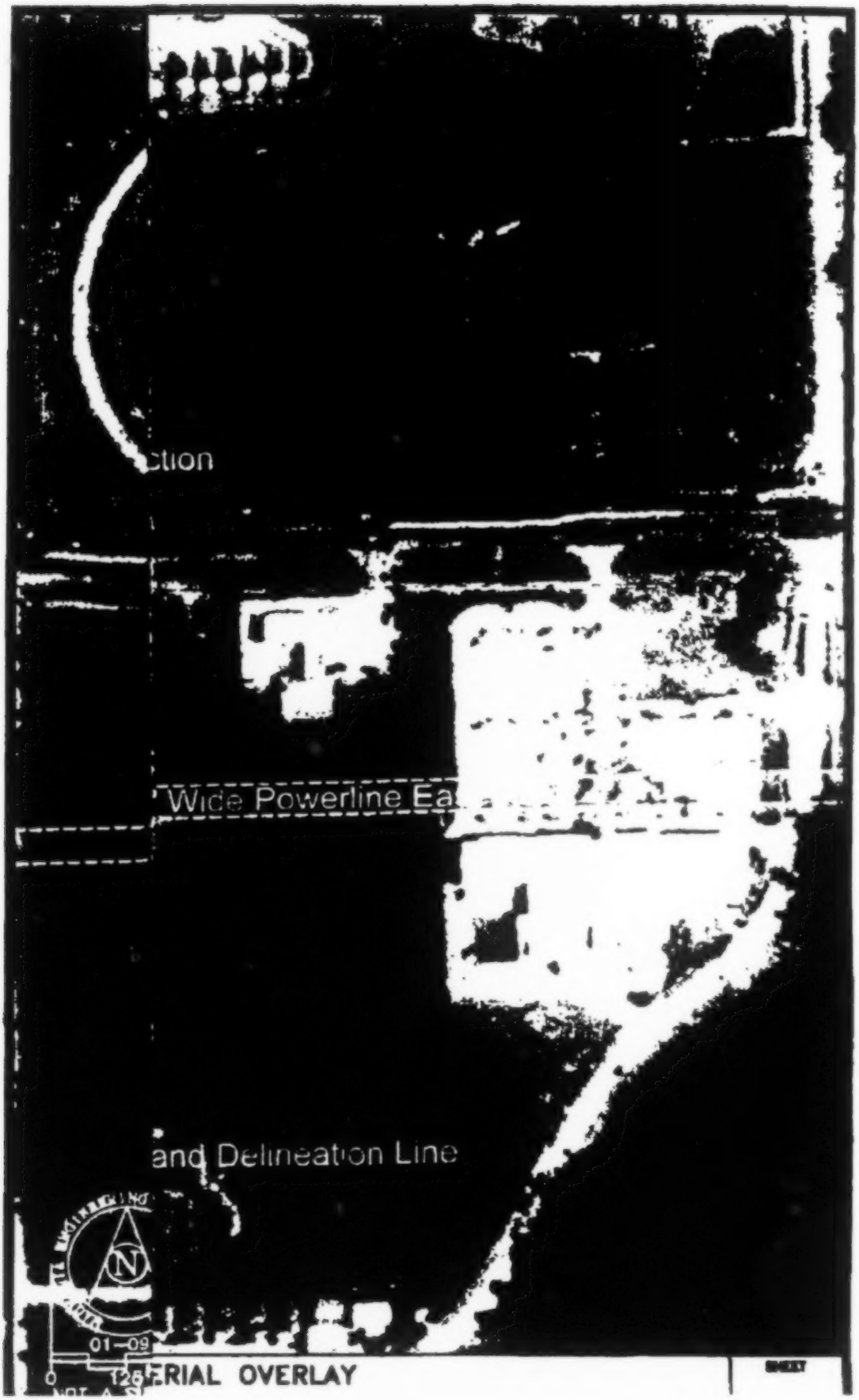
QUESTION CERTIFIED.

GRIFFIN, ORFINGER and TORPHY, JJ., concur.

---

[1] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)

[2] *Dolan v. City of Tigard*, 512 U.S. 374 (1994)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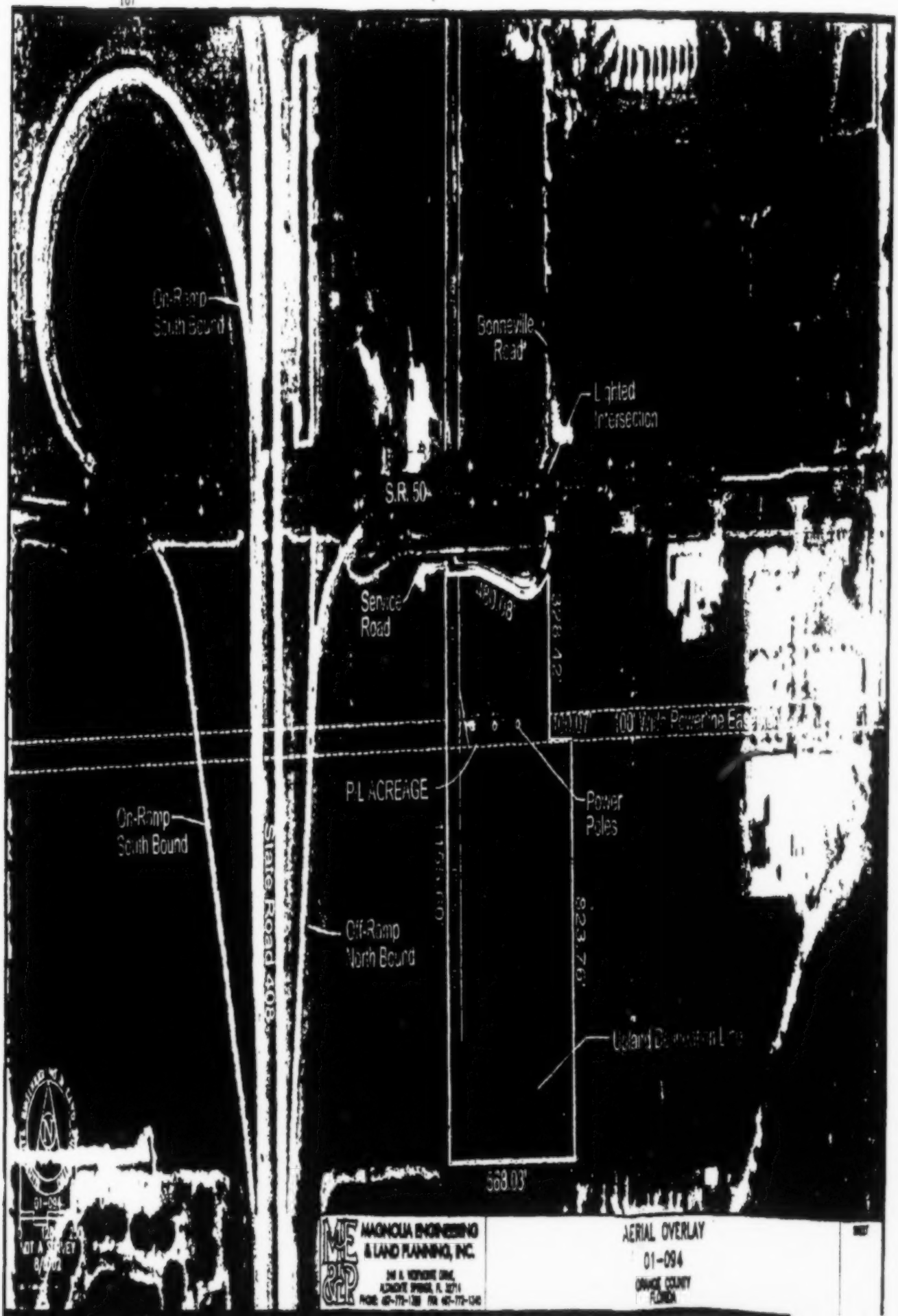
Wide Powerline Ea
and Delineation Line
01-09
ERIAL OVERLAY


On-Ramp
South Bound
Bonneville
Road
Lighted
Intersection
S.R. 50
Service
Road
328.42'
100' Wide Powerline Easement
P.L. ACREAGE
Power
Poles
On-Ramp
South Bound
State Road 408
Off-Ramp
North Bound
823.76'
568.03'
MAGNOLIA ENGINEERING
& LAND PLANNING, INC.
AERIAL OVERLAY
01-094
ORANGE COUNTY
FLORIDA

Supreme Court, U.S.
FILED
NOV 21 2012
OFFICE OF THE CLERK

No. 11-1447

In The Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Florida

JOINT APPENDIX EXHIBITS

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Facsimile: (425) 576-9565
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WILLIAM H. CONGDON JR.
ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT
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Telephone: (386) 329-4314

Counsel for Respondent

Petition For Writ Of Certiorari Filed May 30, 2012
Petition For Writ Of Certiorari Granted October 5, 2012

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Plaintiff's Exhibit 2: Excerpts from Additional Submittal for MSSW Permit Application (Aug. 28, 2002) ..... Ex. 18-20

Plaintiff's Exhibit 3: Excerpts from Dredge and Fill Permit Application (Aug. 28, 2002) ..... Ex. 21-39

Plaintiff's Exhibit 6: Excerpts from Additional Submittal for Dredge and Fill Application (Aug. 28, 2002) ..... Ex. 40-62

Plaintiff's Exhibit 8: BDA 2001 Wetlands Evaluation Report (Aug. 28, 2002) ..... Ex. 63-74

Defendant's Exhibit 1: Cost Estimate Re: Culverts for Off-site Mitigation (Aug. 28, 2002) ..... Ex. 75-76

Defendant's Exhibit 5: Memo on Mitigation from FDEP Secretary Twachtmann (Aug. 28, 2002) ..... Ex. 77-82

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Defendant's Exhibit 32: Memo Re: Mitigation Ratios (Aug. 29, 2002) ..... Ex. 142-144

Defendant's Exhibit 33: Memo Re: Wetland Mitigation (Aug. 29, 2002) ..... Ex. 145-157

Defendant's Exhibit 34: Memo Re: Donation or Preservation of Wetlands (Aug. 29, 2002) ..... Ex. 158-162

Defendant's Exhibit 35: Policy for Secondary & Cum. Impacts in MSSW Program (Aug. 29, 2002) ..... Ex. 163-171

Defendant's Exhibit 36: Stipulated Final Judgment in *Koontz v. Orange Co.* (Aug. 29, 2002) ..... Ex. 172-182

Plaintiff's Exhibit 1: Excerpts from Roper Appraisal (Jan. 10, 2006) ..... Ex. 183-187

Ex. 1

Effective Date
_____

MANAGEMENT AND STORAGE
OF SURFACE WATERS
INDIVIDUAL PERMIT
APPLICATION
CHAPTER 40C-4,
CHAPTER 40C-41, F.A.C.

ST. JOHNS RIVER WATER
MANAGMENT DISTRICT
DEPARTMENT OF
RESOURCE MANAGEMENT
DIVISION OF RECORDS
P. O. BOX 1429
PALATKA, FLORIDA 32176-1429

NUMBER_____
FEE RECEIVED_____
ASSIGNED REVIEWERS_____
PROJECTED DATE OF
ISSUANCE_____

Please type or print with *BLACK* ball point pen. Read *ALL* instructions on the back of this sheet before completing application. Complete necessary data sheets attached.

APPLICATION IS FOR: ____ALTERATION ____OPERATION ____MAINTENANCE ____RE-ISSUANCE ____REMOVAL ____ABANDONMENT ____CONSTRUCTION (APPLICATION TO CONSTRUCT OR ALTER IS ALSO CONSIDERED AS APPLICATION TO OPERATE.) ____MODIFICATION

Ex. 2

OWNER

Name of Owner: Coy A. Koontz
Address: 1120 Ensenada Drive
City: Orlando County: Orange
State: Florida Zip Code: 32825
Telephone No.: (407) 277-7483

APPLICANT/ENTITY TO RECEIVE PERMIT

Name of Applicant: Coy A. Koontz
Address: 1120 Ensenada Drive
City: Orlando County: Orange
State: Florida Zip Code: 32825
Telephone No.: (407) 277-7483

CONSULTANT OR ENGINEER OR SCS DISTRICT CONSERVATIONIST

Name of Firm: The Civil Design Group, Inc.
Name of Firm Contact: William C. Fogle, P.E.
Address: 401 South Rosalind Avenue, Suite 200
City: Orlando County: Orange
State: Florida Zip Code: 32801
Telephone No.: (407) 843-4140

ATTORNEY OF RECORD

Name of Firm:
Name of Firm Contact:
Address:
City: County:
State: Zip Code:
Telephone No.:

PROJECT INFORMATION

Name of Project: Coy A. Koontz
U.S.G.S. Topo Quad Map: Oviedo, S.W. Quadrangle
County: Orange Project Acreage: 3.75
Total Acreage Owned: 15.0
Section: 23 Township: 22 S Range: 31 E
Description of Project: Reclaim approximately 3.75 acres of wetlands for future commercial development. Please refer to narrative in attached permit package.
Description of Proposed Surface Water Works: Please refer to Narrative in attached Permit Package
Water Course/Water Body Most Affected: Un-Named tributary to Econlockhatchee River
Date Construction is Proposed to Commence/End: Mid 1994/Early 1995
If Application is for Alteration of Existing Permit, Give Permit Number: N/A
(Include Information Required on Attached Sheets)

OTHER

Name and Address of Proposed Operation/Maintenance Entity:
Have You Had A Pre-Application Conference With District Staff?
Yes x No Date: 01/20/94 With Whom? Ms. Elizabeth Johnson
Has a Conservation Plan Been Approved by the Local SWCD? No
Has Stormwater Permit or Exemption Been Granted: No If So, Give No.:
Have any Wetland Resource/Dredge and Fill Permits, Authorizations, or Exemptions Been Granted? No
If so, Give Nos. and Agencies:

Ex. 4

** Issuance of Permit Does Not Preclude Responsibility of Applicant to Obtain All Necessary Federal, State, Local Permits **

In compliance with the provisions of Chapter 373, Florida Statutes, 1973, and applicable rules and regulations of St. Johns River Water Management District, application is hereby made for a permit as identified above, and in accordance with support data and incidental information filed with this application and made a part thereof.

COY A. KOONTZ	Coy A. Koontz	2-25-94
Applicant's Name (please print)	Applicant's Signature	Date

If person other than applicant has completed this form, that person certifies by his signature below that he is acting as an authorized agent of the applicant and his signature will be certification that he is in fact the authorized agent.

William C. Fogle, P.E.	William C. Fogle	2-28-94
Applicant's Name (please print)	Applicant's Signature	Date

Ex. 5

PROJECT:	Coy A. Koontz – Property Orange County, Florida
PROJECT No.:	92 – 20
BY:	The Civil Design Group, Inc. Neil F. Mc Leod, Jr., Sr. Eng. Tech.
CHECKED BY:	John W. Butler, E.I.
APPROVED BY:	William Fogle, P.E.
DATE:	February, 1994
SUBJECT:	**M.S.S.W. 40C-4** **PERMIT APPLICATION**

A. Project Description

The property owner wishes to reclaim approximately 3.75 acres of wetlands for future development out of his existing 15.00 acre tract. This total acreage has only 0.06 acres of useable land due to right-of-way acquisition and regulatory agency restrictions. He intends to mitigate the damages created by the filling of the 3.75 acres of wetlands through the dedication of development rights on the remaining 11.25 acres of his property.

The project is located approximately 1,200 feet east of the East-West Expressway on the South side of State Road 50. The project is entirely within the jurisdictional boundaries of the St. Johns River Water Management District and is located in Section 23, Township 22 South, Range 31 East in Orange County, Florida. (Refer to Figure 1)

The proposed filling activity will consist of filling the northern most 3.75 acres, of which 0.02 acres are uplands and the remaining 3.73 acres are wetlands, with approximately 4,296 cubic yards of material. In addition, within the powerline easement that runs through the site a stormwater retention pond is planned. (Refer to Figure 2).

The proposed fill activity will consist of clearing the existing vegetation on the site and importing fill. The fill will be placed at an elevation of 59.0 with the proposed pond having a bottom elevation of 56.0 one (1) foot above the existing ground elevation of 55.0.

ENVIRONMENTAL ANALYSIS

MORGAN ENVIRONMENTAL CONSULTING, INC.

353 SOUTH BLUE LAKE AVENUE DELAND, FLORIDA 32724 PHONE: (904) 738-0633

March 18, 1993

Mr. William C. Fogle, P.E.
The Civil Design Group
401 South Rosalind Avenue
Orlando, Florida 32801-3525

Dear Bill:

Re: Preliminary Environmental Analysis
Coy Koontz Property – East Hwy 50
Section 23, Township 225, Range 31 East

The Coy Koontz site was evaluated with respect to applicable environmental regulations on March 16,

1993. The property was reviewed using criteria established by local, state and federal regulatory agencies. The following is a brief description of conclusions of this evaluation:

Local – The local agency governing the determination of wetlands on this site is Orange County. The County's Conservation Area Ordinance is applied to wetlands within unincorporated areas. Pursuant to this regulation, the entire property (less the two exceptions noted below) would be classified as a Class I Conservation Area. The exceptions to this classification are:

1) The northeast corner of the site, beginning at the edge of the frontage road and extending approximately to the 56.5 contour. This area is dominated by slash pine and palmetto, and is not expected to be classified as a conservation area. An estimated one half acre is included in this non-classified area.

2) Near the southeast corner of the site, a small area dominated by slash pine exists. Using the topographic print provided, it appears this non-regulated area is defined by the 55' contour.

State – Similar to Orange County's anticipated wetland determination, the State of Florida is expected to express regulatory jurisdiction over the majority of this site. This jurisdiction dates back to the early 1970's, when (in 1972) the State Department of Pollution Control (DPC) began exerting jurisdiction over forested and herbaceous wetland systems. This jurisdiction was based upon species

composition of the indigenous plant community occupying the questioned area. Pursuant to the vegetative list used, this jurisdiction would have extended across the site from the east-central portion to the southwest section of this tract. The original jurisdictional line appears to have been confined within the 51' contour, as depicted on the topographic print provided by your office.

The limits of wetlands regulated by the State of Florida (as administered by the current Department of Environmental Regulation and the St. John's River Water Management District) increased significantly in October, 1984, with the adoption and implementation of the Henderson Act. The expanded vegetation list included in this legislation increased the limits of jurisdiction on the subject property considerably. At the southern end of the site, jurisdiction was extended from the 51' contour to approximately the 55' contour. At the northern portion of the site, the limits of state jurisdiction was extended from the 51' contour to the 56.5' contour. These limits conform to the above described limits of Orange County's Conservation Area boundaries.

Federal – The US Army Corps of Engineers (COE) actively began regulating wetlands locally in 1977. Between 1977 and 1987, the COE regulated wetlands primarily according to their classification of "Navigable Waters of the United States". Wetlands connected to (or contiguous with) Navigable Waters of the United States were governed by federal wetlands policy. It is uncertain whether the subject site would

have been classified as being contiguous with navigable waters of the United States during this time period due to the method used at that time by the COE representatives to make such determinations.

Following 1987, the COE's wetland policy expanded. Currently, the COE would express jurisdiction over all portions of the subject tract except for the previously mentioned areas in the northeast and southeast corners. All other areas, including the power line easement, would be classified as wetlands pursuant to current COE wetland criteria.

This information has been provided following an on-site evaluation as a preliminary summary of the status of this site with regards to current and past regulations. If further information is needed, or if clarification of data provided is required, please contact me at your convenience. In the event physical delineation (via flagging) of the various wetland lines is required, please contact me in advance, for scheduling purposes.

Sincerely,

/s/ Jim Morgan
Jim Morgan, President
Morgan Environmental Consulting, Inc.

Ex. 10

MORGAN ENVIRONMENTAL CONSULTING
1353 South Blue Lake Avenue
DeLand, Florida 32724

February 18, 1994

Mr. William C. Fogle, P.E.
The Civil Design Group
401 South Rosalind Avenue, Suite 200
Orlando, Florida 32801

Dear Bill:

Re: RAI Responses
Coy Koontz Property
Permit Application Number 12-095-0109A

The following is offered in response to the Request for Additional Information, dated January 10, 1994, which was received from the Orlando office of the St. John's River Water Management District. As discussed with you, my responses address questions number 1, 2, 4, 5.a., 5.c., and 10, plus a partial answer to question number 3. The numbering sequence below corresponds to the RAI questions, as follows:

1. The wetland component of this site is divided into two sections. The undisturbed wetland area may be accurately described as a second growth forested system. Species composition of the various strata of this forested wetland community reflect infrequent inundation, with saturated soil conditions reasonably to occur throughout the rainy season. Described by strata, as requested, the vegetative composition of this area includes the following:

Canopy –

Pond Pine – *Pinus serotina*
Slash Pine – *Pinus elliottii*
Loblolly Bay – *Gordonia lasianthus*
Red Maple – *Acer rubrum*
Southern Magnolia – *Magnolia grandiflora*
Laurel Oak – *Quercus laurifolia*
Water Oak – *Quercus nigra*
Dahoon Holly – *ilex cassine*

Subcanopy –

Fetterbush – *Lyonia lucida*
Wax myrtle – *Myrica cerifera*
Sea myrtle – *Baccharis augustifolia*

Groundcover –

Palmetto – *Serenoa repens*
Cinnamon fern – *Osmunda cinnamomea*
Swamp fern – *Blechnum serrulatum*
Chord grass – *Spartina bakkeri*
Guinea grass – *Panicum maximum*
Blackberry – *Rubus spp.*
Sphagnum moss – *Sphagnum spp.*
Rush fuirena – *Fuirena scirpoidea*

The other wetland componant of this site includes the disturbed area utilized by the power line easement, which traverses the site from east to west, several hundred feet off the SR 50 right-of-way. This easement is described, as follows:

Groundcover only –

Red root – *Lachnanthes caroliniana*
Rush fuirena – *Fuirena scirpoidea*
Guinea grass – *Panicum maximum*
Sphagnum moss – Sphagnum spp.

Saw grass – *Cladium spp.*
Red top Panicum – *Panicum regidulum*

2. No species of animal, listed as being endangered, threatened, or categorized as a "species of special concern" by either the State of Florida or the federal government, has been observed on this site.

3. Pursuant to our discussions with the staff of the Orlando office of the SJRWMD, the following comments apply to the question of minimization of wetland encroachment. The only usable portion of this site consists of the frontage area, along the right-of-way of SR 50. The wetland area that would be impacted by this development has already been significantly impacted by SR 50, which has severed its northern reaches. The proposed impact area has also been impacted by the power line easement, which bounds the southern limits of the encroachment area. The power line easement has been cleared of all canopy and subcanopy vegetation, and has been maintained, via mowing, to keep the area in a permanently altered state. In addition to the easement along the southern limits of the proposed development area, and the multi-lane highway which bounds the northern limits, the subject area has been further degraded via the presence of a drainage ditch, which is at the western limits. This ditch system has functioned to drain both surface and subsurface waters from this area, further deteriorating the wetland system. As such, the proposed development area is a remnant of a larger historic wetland system. This remnant has been severed to the north, disrupted at

the southern limits, and dewatered by a drainage ditch to the west. At the eastern boundary of the portion of wetland system proposed to be developed, exists an upland area, which is dominated by slash pine and palmetto.

In discussing the minimization of impacts proposed, it is the intent of the developer to limit encroachment to the existing southern limits of the power line easement, and to perpetually preserve the balance of the site in its natural state. This preserve area will include both uplands and wetlands, and includes the most significant intact wetland area in its existing state. Greater than eleven (11) acres of the fifteen (15) acre site is proposed to be preserved, with only the approximately 3.8 acres that have already been most significantly impacted, being proposed for development.

4. Please see attached revised site plans.

5.a) The complete listing of vegetative types located within the two distinct wetland communities of this site have been included in the lengthly response to Question 1. The species composition outlined has been broken down into canopy, subcanopy, and groundcover for the forested wetland area, and has been described as a groundcover area only in the vicinity of the power line easement. Uplands on this site are located at the northeast corner of the tract, and at the southeast corner. Both upland areas are dominated by second growth slash pine and palmetto.

Live oaks are present in the southeast corner of the site, in much less abundance than the slash pine.

As stated previously, no listed species of wildlife have be observed utilizing or residing within the boundaries of this property. Observed wildlife included assorted song birds, common egrets, a box turtle and several rabbits. Tracks and droppings of raccoons have been observed throughout the site.

5.c) Due to the severance on all sides by either roadway construction, cleared easement, drainage ditch, or uplands, the wetland component of this site proposed to be impacted by development is considered to have minimal (or no) regional significance. The historic hydroperiod of this area has been permanently altered, and perhaps eliminated, by the adjacent drainage ditch. Of equal importance is the fact that the historic "thread" of this wetland has ceased to be, due to construction that has occured decades ago. This severance of the historical contiguity of this system is not a temporary circumstance, but rather a long term consequence of a series of modifications that has permanently degraded the form and function of this system. The portion of the wetland on site to the south of the power line easement has retained its significance as a sub-regional wetland system, in that it has retained its contiguity to off-site waters. This area still retains the ability to function as a wildlife corridor, connecting to adjacent forested wetland systems to the south.

10. As discussed previously in the text of these responses, the 3.8 acre impact area has already been significantly altered and degraded by modifications that are unrelated to the current owner and applicant. The utilization of the proposed impact area by fish and wildlife is not considered to be a significant factor, due to the drainage of surface and subsurface water via the adjacent drainage ditch to the west. Similarly, the utilization of this area by wildlife associated with forested wetland strands has been significantly lessened by the severance of the remnant from the balance of this system due to roadway and utility line easement construction. That portion of wetlands on this fifteen acre site which have retained a significant habitat value are proposed to be perpetually preserved, including adjacent uplands located in the southeast corner of the tract. The inherent value of this combination wetland and upland preserve area substantially outweighs the significance of the remnant wetland which is proposed to be impacted.

With regard to wildlife utilization, no species listed as being endangered, threatened, or "special concern" have been observed on this site. Species that have been observed are common birds and mammals which are expected to readily relocate to the significant preserved portion of this site located to the south of the power line easement. Of the portion of the wetland area that is proposed to be impacted, roughly 25% is a cleared power line easement, which is periodically mowed. This area has minimal habitat value.

To summarize all of the responses above, the quality of the portion of wetland within the subject fifteen acre tract that is proposed to be impacted by development is the most significant issue. The impact area is a vestige of a historic strand which has been drained and severed from the balance of the system. Habitat value in this area is minimal and wildlife utilization has not been observed. The manner in which this wetland has been altered in the past does not lend itself to any level of natural restoration of a viable wetland community.

In contrast to the quality of the proposed impact area, the 11+ acres proposed to be perpetually preserved in its existing state is more viable with a significantly greater habitat value. The preserved area has not been severed from off-site areas that were historically contiguous. Additionally, the area south of the power line easement has not been impacted to the degree of the proposed develpment area by the drainage ditch system. As a consequence of these factors, the proposed dedication of all uplands and wetlands located to the south of the power line easement, amounting to greater than two/thirds of the total site, as a perpetual conservation easement, is considered to be an equitable exchange for the proposed development of the already significantly impacted area to the north of the power line easement.

If you have any questions pertaining to the material contained in this correspondence, or if additional information is required, please contact me at your convenience. Similarly, the staff of the St. John's

River Water Management District is welcome to contact me directly if amplification of responses is needed.

Sincerely,

/s/ Jim Morgan
Jim Morgan, President
Morgan Environmental Consulting

Ex. 18

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

M.S.S.W. 40C – 4

PERMIT APPLICATION

REQUEST FOR ADDITIONAL INFORMATION

PROJECT

COY A. KOONTZ – PROPERTY

STATE ROAD 50
ORANGE COUNTY, FLORIDA

PREPARED FOR:

MR. COY A. KOONTZ
1120 ENSENADA DRIVE
ORLANDO, FLORIDA 32825

APRIL 15, 1994

PREPARED BY:

[LOGO] **THE CIVIL DESIGN GROUP INC.**
ENGINEERS • SURVEYORS • PLANNERS
ORLANDO, FLORIDA

William C. Fogle, P.E.
Florida Registration
No. 23785

401 S. ROSALIND AVENUE • SUITE 200
• ORLANDO, FLORIDA 32801 • (407)843-4140
• FAX: (407)872-0760

Ex. 19

PROJECT:	Coy A. Koontz – Property Orange County, Florida
PROJECT No.:	92 – 20
BY:	The Civil Design Group, Inc. Neil F. Mc Leod, Jr., MBA, Sr. Eng. Tech.
CHECKED BY:	Mr. John W. Butler, E.I.
APPROVED BY:	William Fogle, P.E.
DATE:	April, 1994
SUBJECT:	**M.S.S.W. 40C-4 PERMIT (Request for Additional Information)**

INTRODUCTION

The purpose of this report is to respond to the request for additional information from the St. Johns River Water Management District with regard to the submitted Management and Storage Waters Individual permit application No. 4-095-0474A.

COMMENT 1.

Staff has reviewed the proposed encroachments into the Riparian Habitat protection Zone (RHPZ), as well as the associated mitigation plan. The mitigation plan does not provide adequate reasonable assurance that there will be no adverse impacts to fish and wildlife. Additionally, the site plan (and associates mitigation) does not provide adequate reasonable assurance that the activities will not have any adverse secondary or cumulative impacts to wetlands,

water quality, and upland habitat for aquatic and wetland dependent fish or wildlife listed as endangered, threatened, or of special concern.

RESPONSE 1.

Mr. Koontz is not financially able to participate in any purchase of off-site areas for mitigation purposes. Mr. Koontz presently owns the entire 15.00 acres of the total site in question and is wanting to reclaim 3.75 acres of this site for development. This leaves a balance of 11.25 total acres that he has stated will not be developed and will be preserved for mitigated purposes.

Ex. 21

DEPARTMENT OF ENVIRONMENTAL REGULATIONS / CORPS OF ENGINEERS

DREDGE AND FILL
PERMIT APPLICATION

PROJECT

COY A. KOONTZ – PROPERTY

STATE ROAD 50
ORANGE COUNTY, FLORIDA

PREPARED FOR:

MR. COY A. KOONTZ
1120 ENSENADA DRIVE
ORLANDO, FLORIDA 32825

DECEMBER, 1993

PREPARED BY:

[LOGO] **THE CIVIL DESIGN GROUP INC.**
ENGINEERS • SURVEYORS • PLANNERS
ORLANDO, FLORIDA

William C. Fogle
William C. Fogle, P.E.
Florida Registration
No. 23785

401 S. ROSALIND AVENUE • SUITE 200
• ORLANDO, FLORIDA 32801 • (407)843-4140
• FAX: (407)872-0760

Ex. 22

[SEAL] *Florida Department of Environmental Regulation*
Twin Towers Office Bldg • 2600 Blair Stone Road
• Tallahassee, Florida 32399-2400

DER Form # 17-312.900(1)
Form Title Joint Ap for Works in the Waters of Florida
Effective Date October 10, 1990
DER Application No _____

Joint Application for Works in the Waters of Florida

Department of the Army (Corps)/Florida Department of Environmental Regulation (DER)/Department of Natural Resources (DNR)/Delegated Water Management District (Delegated WMD)

Type or Print Legibly

Corps Application Number (official use only)	DER Application Number (official use only)

1. Applicant's Name and Address

Name KOONTZ COY A.
Last Name, First name (if individual);
Corporate Name; Name of Govt. Agency

Street 1120 ENSENADA DRIVE

City ORLANDO State FLORIDA Zip 32825

Telephone (407) 277-7483 (Day) (___) _____ (Night)

2. Name, Address, Zip Code, Telephone Number and Title of Applicant's Authorized Agent

Name FOGLE, P.E., WILLIAM C.
Last Name, First name

Corporate Name; Name of Govt. Agency THE CIVIL DESIGN GROUP, INC.

Street 401 SOUTH ROSALIND AVENUE – SUITE 200

City ORLANDO State FLORIDA Zip 32801

Telephone (407) 843-4140 (Day) (___) _____ (Night)

3. Name of Waterway at Work Site: UN-NAMED TRIBRUTARY TO THE ECONLOCKHATCHEE RIVER

4. Street, Road or Other Location of Work APPROX. 1200' EAST OF THE EAST-WEST EXPRESSWAY ON S.R. 50

Incorporated City or Town ORANGE COUNTY, FLORIDA

Section 23 Township 22 S Range 31 E
Section ____ Township ____ Range ____
Section ____ Township ____ Range ____

County(ies) ORANGE COUNTY, FLORIDA

Federal Projects Only: ____ x ____ y

Coordinates in Center of Project:

Latitude 28° 33 ' 47 " Latitude 81 11 ' 17 "

Lot ____ Block ____ Subd ____ Plat Bk ____ Pg ____

Directions to Locate Site: EAST OF THE EAST-WEST EXPRESSWAY APPROXIMATELY 1200' DIRECTLY ACROSS FROM BONNEVILLE DRIVE ON THE SOUTH SIDE OF STATE ROAD 50

5. Names, Addresses, and Zip Codes of Adjacent Property Owners Whose Property Also Adjoins the Water (Excluding Applicant). Show Numbers or Names of These Owners on Plan Views. If More Than Six (6) Owners Adjoin the Project, You May Be Required to Publish a Public Notice for the DER. SEE ATTACHED SHEETS IN PERMIT PACKAGE

1. _____	2. _____	3. _____
4. _____	5. _____	6. _____

6. Proposed Use (Check one or more as applicable)

Private Single Family ☐ Multi Family ☐
Public ☐ Commercial ☒ New Work ☐
Alteration of Existing Works ☐ Maintenance ☐
Other (Explain) _____

7. Desired Permit Duration (see Fee Schedule)

5 Yr ☒ 10 Yr ☐ Other (Specify) _____

8. General Permit or Exemption Requested

DER General Permit FAC Rule 17-312. ____
DER Exemption FAC Rule 17-312. ____
Section 403. ____ F.S.

9. Total Extent of Work in Jurisdictional Open Waters or Wetlands: (Use additional sheets and provide complete breakdown of each category if more space is needed.

a. Within Corps Jurisdiction: TOTAL IMPROVED SITE
Fill:
6,628 Sq. Ft. 3.75 Acres 16,696 Cu. Yds.
Excavation:
_____ Sq. Ft. ____ Acres _____ Cu. Yds.

b. Within DER Jurisdiction:
Fill:
6,628 Sq. Ft. 3.75 Acres 16,696 Cu. Yds.
Excavation:
_____ Sq. Ft. ____ Acres _____ Cu. Yds.
Excavation Waterward of MHW NONE cu. yds. (information needed for DNR)

c. DER Jurisdictional Area Severed (Area Landward of Fill Structures which will be Severed):
0 Sq. Ft. 0 Acres

d. DER Jurisdictional Area Created (New Excavation from Uplands, Exclusive of Mitigation):
0 Sq. Ft. 0 Acres

e. Docks, Piers and Over Water Structures:
Total Number of Slips N/A
Total Number of Mooring Pilings _____
Length __ Width __ Height above MHW __
Length __ Width __ Height above MHW __

Number of Finger Piers __ Length ___
Width __ Height __
Number of Finger Piers __ Length ___
Width __ Height __
Total area of structure over waters & wetlands _____ sq. ft.
Use of structure

	No	Yes	Number
Will the docking facility provide:	☐	☐	_____
Liveaboard Slips	☐	☐	_____
Fueling Facilities	☐	☐	_____
Sewage Pump-Out Facilities	☐	☐	_____
Other Supplies or Services Required for Boating (Excluding refreshments, bait and tackle)	☐	☐	_____

f. Seawall length ____ ft. Sewall material _____

Riprap revetment length _____ ft. Slope __ H:__V
Toe width __ ft.

Riprap at toe of seawall length _____ ft. Slope __ H:__V
Toe width __ ft.

Size of riprap _____

Type of riprap or seawall material _____

g. Other (See Item 10).

10. Description of Work (be specific; use additional sheets as necessary).

PLEASE REFER TO ATTACHED NARRATIVE IN PERMIT PACKAGE

11. Turbidity, Erosion, and Sedimentation Controls Proposed:

PLEASE REFER TO NARRATIVE AND CONSTRUCTION DRAWINGS IN PERMIT PACKAGE

12. Date Activity is Proposed to Commence MID – 1994; to be Completed EARLY 1995

Total Time Required to Construct 6 to 8 MONTHS

13. Previous Applications for this Project have been:

	DER No.	Corps No.
A. Denied (date) N/A	_____	_____
B. Issued (date) N/A	_____	_____

C. Other (please explain) _____

Differentiate between existing work and proposed work on the drawings.

14. Certification. Application is hereby made for a permit or permits to authorize the activities described herein.

A. I Certify that: (Please check appropriate space)

1. I am the record owner ☒, lessee ☐, or the record easement holder ☐of the property on which the proposed project is to be undertaken, as described in the attached legal document.

2. I am not ☐ the record owner, lessee, or record easement holder of the property on which the proposed project is to be undertaken, as described in the attached legal document, but I will have, before undertaking the proposed work, the requisite property interest. (Please explain what the interest will be and how it will be acquired.)

Attach legal description of property or copy of deed to the property on which project is to occur (must be provided)

B. I understand I may have to provide any additional information/data that may be necessary to provide reasonable assurance or evidence that the proposed project will comply with the applicable State Water Quality Standards or other environmental standards both before construction and after the project is completed.

C. In addition, I agree to provide entry to the project site for inspectors with proper identification or documents as required by law from the environmental agencies for the purpose of inspecting the site. Further, I agree to provide entry to the project site for such inspectors to monitor permitted work, if a permit is granted.

D. This is a Joint Application and is **not** a Joint Permit. I hereby acknowledge the obligation and responsibility for obtaining all of the required state, federal or local **permits** before commencement of construction. I also understand that before commencement of this proposed project, I must be granted separate permits or authorizations from the U.S. Corps of Engineers, the

U.S. Coast Guard the Department of Environmental Regulation, the Delegated Water Management District (where applicable), and the Department of Natural Resources, as necessary.

E. I am familiar with the information contained in this application, and that to the best of my knowledge and belief, such information is true, complete and accurate. I further certify that I possess the authority to undertake the proposed activities or am acting as the duly authorized agent of the applicant. I understand that knowingly making any false statement or representation in this application is a violation of Section 403.161, F.S. and Chapter 837, F.S.

WILLIAM C. FOGLE, P.E.	William C. Fogle
Typed/Printed Name of Applicant or Agent	Signature of Applicant or Agent

12-14-93
Date

PRESIDENT/THE CIVIL DESIGN GROUP, INC.
(Corporate Title if applicable)

AN AGENT MAY SIGN ABOVE IF APPLICANT COMPLETES THE FOLLOWING:

I hereby designate and authorize the agent listed above to act on my behalf as my agent in the processing of this permit application and to furnish on request, supplemental information in support of the application.

COY A. KOONTZ	Coy A. Koontz
Typed/Printed Name of Applicant	Signature of Applicant

OWNER	
(Corporate Title if applicable)	Date

Notarization:

Sworn and subscribed before me at ORANGE County, FLORIDA, this FOURTEENTH day of DECEMBER, 1993.

Personally Known ☒ OR Produced Identification

Type of I.D. Produced _____

/s/ Judy H. Rogers
Notary Public
JUDY H. ROGERS #CC118725

Notary Public
State of Florida at Large
My Commission Expires:
June 17, 1995

15. For your information: Section 370.034, Florida Statutes, requires that all dredge and fill equipment owned, used, leased, rented or operated in the state shall be registered with the Department of Natural Resources. Before selecting your contractor or equipment you may wish to determine if this requirement has been met. For further information, contact the Chief of the Bureau of Saltwater Licenses and Permits, Department of Natural Resources, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399. Telephone No. (904) 487-3122. **This is not a requirement for a permit from the Department of Environmental Regulation.**

18 U.S.C. Section 1001 provides that, Whoever, in any manner within the jurisdiction of any department or agency of The United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact

or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
16. Please submit this completed form, with attached drawings and the complete DER processing fee (see Fee Schedule in F.A.C. Rule 17.4050(4)(c), copy attached) to the appropriate DER or Delegated WMD office with jurisdiction over the project site.

PROJECT:	Coy A. Koontz – Property Orange County, Florida
PROJECT No.:	92-20
BY:	The Civil Design Group, Inc. Neil F. Mc Leod, Jr., Sr. Eng. Tech.
CHECK & APPROVED BY :	William Fogle, P.E.
DATE:	December 1993
SUBJECT:	**DREDGE AND FILL PERMIT**

INTRODUCTION

The purpose of this report is to describe the dredge and fill activities associated with the proposed project. Pursuant to Chapter 17-31.2.070(1), an Application for certain Dredging and Filling, a **Joint Application for Works in the Waters of Florida** is being applied for.

A. Project Description

The property owner wishes to reclaim approximately 3.75 acres of wetlands for future development out of his existing 15.00 acre tract. This total acreage has only 0.06 acres of useable land due to right-of-way acquisition and regulatory agency restrictions. He intends to mitigate the damages created by the filling of the 3.75 acres of wetlands through the dedication of development rights on the remaining 11.25 acres of his property.

The project is located approximately 1,200 feet east of the East-West Expressway on the South side of State Road 50. The project is entirely within the jurisdictional boundaries of the St. Johns River Water Management District and is located in Section 23, Township 22 South, Range 31 East in Orange County, Florida. (Refer to Figure 1)

The proposed filling activity will consist of filling the northern most 3.75 acres, of which 0.02 acres are uplands and the remaining 3.73 acres are wetlands, with approximately 6,628 cubic yards of material. In addition, within the powerline easement that runs through the site a stormwater retention pond is planned. (Refer to Figure 2).

B. Description of Drainage Basin

The existing drainage of the site is to an un-named tributary that runs through the site and eventually discharges into the Econlockhatchee River. There is an existing open channel ditch that flows from north to south on the west property line of the property that provides an outfall for drainage from the north of the site.

The adjacent properties along the north side of the roadway flow directly to the above mentioned ditch. The property on the west property line flows overland to the ditch or directly into the un-named tributary.

C. Flood Plain

The project lies inside and outside the limits of the 100 year flood plain as per the Flood Insurance Rate Map, Panel Number 120179-250D.(Refer to Figure 3) According to the Flood Insurance Rate Map (FIRM) for Orange County in the vicinity of this site the northern portion that is planned to be filled lies in Zone – C and the southern portion has an area that cuts through the area that is located in Zone – A.. All proposed construction activity is planned to be within the Zone – C area.

D. Permit Criteria

As stated in previously, this project falls under the jurisdiction of SJRWMD. Pursuant to Chapter 17-312.070 (1), this project qualifies as a Joint Application for Works in the Waters of Florida. There are certain requirements which must be met in order to qualify for this permit.

These restrictions are:

1. Dredging and Filling in, on waters of the state, including construction over waters of the state which is associated with the dredging or filling for which a short form application shall be used.
2. Except for dredging or filling associated with mosquito control activities, projects which affect a total of less than ten (10) acres of jurisdictional waters of the state.

E. Proposed Dredge or Filling Activities

The proposed filling activity will consist of filling the northern most 3.75 acres with approximately 6,628 cubic yards of material. In addition, within the powerline easement that runs through the site a stormwater retention pond is planned.

Please refer to sketches throughout this permit package for further information regarding the proposed impacts. In addition, please refer to site evaluation information prepared by Morgan Environmental Services, contained in this permit package.

F. Erosion and Turbidity Control

Erosion and turbidity discharge to receiving bodies will be limited by the use of erosion control measures and turbidity barriers. These devices are in accordance with, or exceed the standards set forth in the "Standard Specifications for Road and Bridge Construction, Edition 1986". The downstream end of the site as well as the west side of the property shall have staked silt fence installed before any construction, and it will be maintained during the construction period.

Ex. 36

ENVIRONMENTAL ANALYSIS

MORGAN ENVIRONMENTAL CONSULTING, INC.

353 SOUTH BLUE LAKE AVENUE DELAND, FLORIDA 32724 PHONE: (904) 738-0633

March 18, 1993

Mr. William C. Fogle, P.E.
The Civil Design Group
401 South Rosalind Avenue
Orlando, Florida 32801-3525

Dear Bill:

Re: Preliminary Environmental Analysis
Coy Koontz Property - East Hwy 50
Section 23, Township 225, Range 31 East

The Coy Koontz site was evaluated with respect to applicable environmental regulations on March 16, 1993. The property was reviewed using criteria established by local, state and federal regulatory agencies. The following is a brief description of conclusions of this evaluation:

Local – The local agency governing the determination of wetlands on this site is Orange County. The County's Conservation Area Ordinance is applied to wetlands within unincorporated areas. Pursuant to this regulation, the entire property (less the two exceptions noted below) would be classified as a Class I Conservation Area. The exceptions to this classification are:

1) The northeast corner of the site, beginning at the edge of the frontage road and extending approximately to the 56.5 contour. This area is dominated by slash pine and palmetto, and is not expected to be classified as a conservation area. An estimated one half acre is included in this non-classified area.

2) Near the southeast corner of the site, a small area dominated by slash pine exists. Using the topographic print provided, it appears this non-regulated area is defined by the 55' contour.

State – Similar to Orange County's anticipated wetland determination, the State of Florida is expected to express regulatory jurisdiction over the majority of this site. This jurisdiction dates back to the early 1970's, when (in 1972) the State Department of Pollution Control (DPC) began exerting jurisdiction over forested and herbaceous wetland systems. This jurisdiction was based upon species composition of the indigenous plant community occupying the questioned area. Pursuant to the vegetative list used, this jurisdiction would have extended across the site from the east-central portion to the southwest section of this tract. The original jurisdictional line appears to have been confined within the 51' contour, as depicted on the topographic print provided by your office.

The limits of wetlands regulated by the State of Florida (as administered by the current Department of Environmental Regulation and the St. John's River Water Management District) increased significantly

in October, 1984, with the adoption and implementation of the Henderson Act. The expanded vegetation list included in this legislation increased the limits of jurisdiction on the subject property considerably. At the southern end of the site, jurisdiction was extended from the 51' contour to approximately the 55' contour. At the northern portion of the site, the limits of state jurisdiction was extended from the 51' contour to the 56.5' contour. These limits conform to the above described limits of Orange County's Conservation Area boundaries.

Federal – The US Army Corps of Engineers (COE) actively began regulating wetlands locally in 1977. Between 1977 and 1987, the COE regulated wetlands primarily according to their classification of "Navigable Waters of the United States". Wetlands connected to (or contiguous with) Navigable Waters of the United States were governed by federal wetlands policy. It is uncertain whether the subject site would have been classified as being contiguous with navigable waters of the United States during this time period due to the method used at that time by the COE representatives to make such determinations.

Following 1987, the COE's wetland policy expanded. Currently, the COE would express jurisdiction over all portions of the subject tract except for the previously mentioned areas in the northeast and southeast corners. All other areas, including the power line easement, would be classified as wetlands pursuant to current COE wetland criteria.

This information has been provided following an on-site evaluation as a preliminary summary of the status of this site with regards to current and past regulations. If further information is needed, or if clarification of data provided is required, please contact me at your convenience. In the event physical delineation (via flagging) of the various wetland lines is required, please contact me in advance, for scheduling purposes.

Sincerely,

/s/ Jim Morgan
Jim Morgan, President
Morgan Environmental Consulting, Inc.

Ex. 40

DEPARTMENT OF ENVIRONMENTAL REGULATIONS / CORPS OF ENGINEERS
ST. JOHNS RIVER
WATER MANAGEMENT DISTRICT

DREDGE AND FILL
PERMIT APPLICATION

REQUEST FOR ADDITIONAL INFORMATION

PROJECT

COY A. KOONTZ – PROPERTY

STATE ROAD 50
ORANGE COUNTY, FLORIDA

PREPARED FOR:

MR. COY A. KOONTZ
1120 ENSENADA DRIVE
ORLANDO, FLORIDA 32825

FEBRUARY, 1994

PREPARED BY:

[LOGO] **THE CIVIL DESIGN GROUP INC.**
ENGINEERS • SURVEYORS • PLANNERS
ORLANDO, FLORIDA

/s/ William C. Fogle
2-28-94
William C. Fogle, P.E.
Florida Registration
No. 23785

Ex. 41

401 S. ROSALIND AVENUE • SUITE 200
• ORLANDO, FLORIDA 32801 • (407)843-4140
• FAX: (407)872-0760

PROJECT:	Coy A. Koontz – Property Orange County, Florida
PROJECT No.:	92-20
BY:	The Civil Design Group, Inc. Neil F. Mc Leod, Jr., Sr. Eng. Tech.
CHECK & APPROVED BY :	William Fogle, P.E.
DATE:	February 1994
SUBJECT:	**DREDGE AND FILL PERMIT (Request for Additional Information)**

INTRODUCTION

The purpose of this report is to describe the request for additional information that was requested from the St. Johns River Water Management District with regard to the submitted dredge and fill permit application No. 12-095-0109A.

COMMENT 1.

Please provide a detailed description of the wetland communities found within the subject property. Include a description of the plant species composition, using the Latin and common names, in all strata, for each wetland species identified.

RESPONSE 1.

Please find attached response to the requested information prepared by Morgan Environmental Services.

COMMENT 2.

Please provide a list, using common and Latin names, of wildlife species that have either been observed and/or are anticipated to utilize, or occur on, the subject site, that are listed as endangered, threatened, or a species of special concern by the Florida Games and Freshwater Fish Commission, or the Florida Department of Agriculture.

RESPONSE 2.

Please find attached response to the requested information prepared by Morgan Environmental Services.

COMMENT 3.

Demonstrate that the proposed 3.8 acres of wetland encroachments have been minimized and/or are avoidable. Attempts to minimize would include, but not be limited to, retaining walls for the southern limit of the proposed retention pond, etc.

RESPONSE 3.

In order for Mr. Koontz to recover a portion of his property for development the 3.75 acres of area requiring filling will have to be impacted. The proposed retention pond on the southern property line has been designed so that the runoff from the site will be directed to this pond. The sideslope of the south side of the pond have been moved to the north to be within the southern line of the existing power line easement. The side slopes on the entire proposed pond will be sodded as soon as they are constructed so that any erosion that may occur will be minimal. In addition silt fence barriers along the entire property line will be in-place prior to any and all construction.

COMMENT 4.

On the plans, please more clearly identify the extent of wetlands that occur on the site. Differentiate the areas proposed for encroachments versus the areas that are to remain undisturbed.

RESPONSE 4.

Plans have been modified to show areas that are wetlands and uplands. This is for both the filled area as well as the area to the south that will not be disturbed.

COMMENT 5.

Although an evaluation of the proposed mitigation plan will not be conducted until the application is technically and administratively complete, please provide details on the proposed preservation areas. Provide the following:

a. A detailed vegetative and wildlife survey of each community.

b. The acreage of each community.

c. Supporting information as to the "regional Significance" of each community.

d. Draft conservation easement documentation that will adequately restrict activities within the proposed preservation areas.

e. How access can be obtained to the preservation areas for long term management.

RESPONSE 5.

Please refer to attached data supplied by Morgan Environmental Services.

COMMENT 6.

Please provide information as to what the intended use of the site will be. Demonstrate that the intended use is consistent with the amount of wetland encroachments that have been proposed.

RESPONSE 6.

The final use for the 3.75 acres requesting to filled is unknown at this time. The owner is trying to reclaim a portion of his property in order to be able to sell the 3.75 acres as a commercial tract. We anticipate the property will be utilized for commercial activities and we have designed the stormwater retention system for 80% impervious surfaces on the 3.75 acre tract. Only that portion of the site north of the existing power line is being reclaimed for future development. The remaining acreage will have a conservation easement dedicated to the St. John's River Water Management District and there by protected from any future development.

The 3.75 acres proposed to be reclaimed will be the only portion of the property available for development and any future use will be restricted to this area.

Comment 7.

Demonstrate that the fill that is proposed within the ditch will not adversely affect the ditch's conveyance capabilities.

RESPONSE 7.

The proposed fill activities has been moved away from the top of bank, of the existing ditch on the west property line of the project. It was never intended for this ditch to be filled nor was it the intention for this ditch to be blocked in any way.

COMMENT 8.

Please delineate on the plans, sediment and erosion control measures that will adequately prevent the discharge of turbid waters into the western ditch. The placement of fill adjacent to and/within the ditch may cause water quality problems is not adequately protected.

RESPONSE 8.

The existing drawing that was submitted showed a silt fence barrier adjacent to the fill area at the west ditch. With the fill being moved back from the top of the existing ditch bank a silt fence as well as a hay baled screen can be installed along the existing ditch bank to help prevent sediment from entering the existing ditch.

COMMENT 9.

Demonstrate that the proposed surface water management ponds will not adversely affect the wetland. An analysis will be required to determine the potential extent of drawdown caused by the proposed pond. Please provide all calculations, data, and methodologies used to determine

the final amount of drawdown the wetland will have in the post development stage.

RESPONSE 9.

The requested data and calculations are included in this response package.

COMMENT 10.

Staff has determined, based on a preliminary review of the mitigation proposal, as it relates to the current site plan with the proposed wetland encroachments, that the applicant has not provided the required reasonable assurances that there will be no adverse impacts of fish and wildlife. Therefore, staff believes that the project, as proposed, does not meet the criteria in section 403.918, F.S. [17-312.60, F.A.C.]

RESPONSE 10.

Please find attached response to the requested information prepared by Morgan Environmental Services.

COMMENT 11.

Demonstrate that the placement of fill on the subject property will not adversely affect adjacent property owners.

RESPONSE 11.

The existing site drainage is toward the existing un-named tributary located to the southeast of

the proposed fill activity area. The existing ditch on the west side of the site picks-up all the drainage from the property to the west of this site. The parcel to the east of this site is not affected by the site due to it having a positive flow to the southeast also. All of the proposed fill area drainage will be contained on the site with the development of the proposed retention pond and discharge will be through a control structure that will flow into the existing flowage way for the entire 15.00 acre parcel.

ENVIRONMENTAL ANALYSIS
RESPONSE TO R.A.I.

MORGAN ENVIRONMENTAL CONSULTING
1353 South Blue Lake Avenue
DeLand, Florida 32724

February 18, 1994

Mr. William C. Fogle, P.E.
The Civil Design Group
401 South Rosalind Avenue, Suite 200
Orlando, Florida 32801

Dear Bill:

Re: RAI Responses
Coy Koontz Property
Permit Application Number 12-095-0109A

The following is offered in response to the Request for Additional Information, dated January 10, 1994, which was received from the Orlando office of the St.

John's River Water Management District. As discussed with you, my responses address questions number 1, 2, 4, 5.a., 5.c., and 10, plus a partial answer to question number 3. The numbering sequence below corresponds to the RAI questions, as follows:

1. The wetland componant of this site is divided into two sections. The undisturbed wetland area may be accurately described as a second growth forested system. Species composition of the various strata of this forested wetland community reflect infrequent inundation, with saturated soil conditions reasonably to occur throughout the rainy season. Described by strata, as requested, the vegetative composition of this area includes the following:

Canopy –

Pond Pine – *Pinus serotina*
Slash Pine – *Pinus elliottii*
Loblolly Bay – *Gordonia lasianthus*
Red Maple – *Acer rubrum*
Southern Magnolia – *Magnolia grandiflora*
Laurel Oak – *Quercus laurifolia*
Water Oak – *Quercus nigra*
Dahoon Holly – *ilex cassine*

Subcanopy –

Fetterbush – *Lyonia lucida*
Wax myrtle – *Myrica cerifera*
Sea myrtle – *Baccharis augustifolia*

Groundcover –

Palmetto – *Serenoa repens*
Cinnamon fern – *Osmunda cinnamomea*

Swamp fern – *Blechnum serrulatum*
Chord grass – *Spartina bakkeri*
Guinea grass – *Panicum maximum*
Blackberry – *Rubus spp.*
Sphagnum moss – *Sphagnum spp.*
Rush fuirena – *Fuirena scirpoidea*

The other wetland componant of this site includes the disturbed area utilized by the power line easement, which traverses the site from east to west, several hundred feet off the SR 50 right-of-way. This easement is described, as follows:

Groundcover only –

Red root – *Lachnanthes caroliniana*
Rush fuirena – *Fuirena scirpoidea*
Guinea grass – *Panicum maximum*
Sphagnum moss – Sphagnum spp.
Saw grass – *Cladium spp.*
Red top Panicum – *Panicum regidulum*

2. No species of animal, listed as being endangered, threatened, or categorized as a "species of special concern" by either the State of Florida or the federal government, has been observed on this site.

3. Pursuant to our discussions with the staff of the Orlando office of the SJRWMD, the following comments apply to the question of minimization of wetland encroachment. The only usable portion of this site consists of the frontage area, along the right-of-way of SR 50. The wetland area that would be impacted by this development has already been significantly impacted by SR 50, which has severed its

northern reaches. The proposed impact area has also been impacted by the power line easement, which bounds the southern limits of the encroachment area. The power line easement has been cleared of all canopy and subcanopy vegetation, and has been maintained, via mowing, to keep the area in a permanently altered state. In addition to the easement along the southern limits of the proposed development area, and the multi-lane highway which bounds the northern limits, the subject area has been further degraded via the presence of a drainage ditch, which is at the western limits. This ditch system has functioned to drain both surface and subsurface waters from this area, further deteriorating the wetland system. As such, the proposed development area is a remnant of a larger historic wetland system. This remnant has been severed to the north, disrupted at the southern limits, and dewatered by a drainage ditch to the west. At the eastern boundary of the portion of wetland system proposed to be developed, exists an upland area, which is dominated by slash pine and palmetto.

In discussing the minimization of impacts proposed, it is the intent of the developer to limit encroachment to the existing southern limits of the power line easement, and to perpetually preserve the balance of the site in its natural state. This preserve area will include both uplands and wetlands, and includes the most significant intact wetland area in its existing state. Greater than eleven (11) acres of the fifteen (15) acre site is proposed to be preserved, with only

the approximately 3.8 acres that have already been most significantly impacted, being proposed for development.

4. Please see attached revised site plans.

5.a) The complete listing of vegetative types located within the two distinct wetland communities of this site have been included in the lengthly response to Question I. The species composition outlined has been broken down into canopy, subcanopy, and groundcover for the forested wetland area, and has been described as a groundcover area only in the vicinity of the power line easement. Uplands on this site are located at the northeast corner of the tract, and at the southeast corner. Both upland areas are dominated by second growth slash pine and palmetto. Live oaks are present in the southeast corner of the site, in much less abundance than the slash pine.

As stated previously, no listed species of wildlife have be observed utilizing or residing within the boundaries of this property. Observed wildlife included assorted song birds, common egrets, a box turtle and several rabbits. Tracks and droppings of raccoons have been observed throughout the site.

5.c) Due to the severance on all sides by either roadway construction, cleared easement, drainage ditch, or uplands, the wetland component of this site proposed to be impacted by development is considered to have minimal (or no) regional significance. The historic hydroperiod of this area has been permanently altered, and perhaps eliminated, by the adjacent

drainage ditch. Of equal importance is the fact that the historic "thread" of this wetland has ceased to be, due to construction that has occured decades ago. This severance of the historical contiguity of this system is not a temporary circumstance, but rather a long term consequence of a series of modifications that has permanently degraded the form and function of this system. The portion of the wetland on site to the south of the power line easement has retained its significance as a sub-regional wetland system, in that it has retained its contiguity to off-site waters. This area still retains the ability to function as a wildlife corridor, connecting to adjacent forested wetland systems to the south.

10. As discussed previously in the text of these responses, the 3.8 acre impact area has already been significantly altered and degraded by modifications that are unrelated to the current owner and applicant. The utilization of the proposed impact area by fish and wildlife is not considered to be a significant factor, due to the drainage of surface and subsurface water via the adjacent drainage ditch to the west. Similarly, the utilization of this area by wildlife associated with forested wetland strands has been significantly lessened by the severance of the remnant from the balance of this system due to roadway and utility line easement construction. That portion of wetlands on this fifteen acre site which have retained a significant habitat value are proposed to be perpetually preserved, including adjacent uplands located in the southeast corner of the tract. The

inherent value of this combination wetland and upland preserve area substantially outweighs the significance of the remnant wetland which is proposed to be impacted.

With regard to wildlife utilization, no species listed as being endangered, threatened, or "special concern" have been observed on this site. Species that have been observed are common birds and mammals which are expected to readily relocate to the significant preserved portion of this site located to the south of the power line easement. Of the portion of the wetland area that is proposed to be impacted, roughly 25% is a cleared power line easement, which is periodically mowed. This area has minimal habitat value.

To summarize all of the responses above, the quality of the portion of wetland within the subject fifteen acre tract that is proposed to be impacted by development is the most significant issue. The impact area is a vestige of a historic strand which has been drained and severed from the balance of the system. Habitat value in this area is minimal and wildlife utilization has not been observed. The manner in which this wetland has been altered in the past does not lend itself to any level of natural restoration of a viable wetland community.

In contrast to the quality of the proposed impact area, the 11+ acres proposed to be perpetually preserved in its existing state is more viable with a significantly greater habitat value. The preserved area has not been severed from off-site areas that were historically

contiguous. Additionally, the area south of the power line easement has not been impacted to the degree of the proposed develpment area by the drainage ditch system. As a consequence of these factors, the proposed dedication of all uplands and wetlands located to the south of the power line easement, amounting to greater than two/thirds of the total site, as a perpetual conservation easement, is considered to be an equitable exchange for the proposed development of the already significantly impacted area to the north of the power line easement.

If you have any questions pertaining to the material contained in this correspondence, or if additional information is required, please contact me at your convenience. Similarly, the staff of the St. John's River Water Management District is welcome to contact me directly if amplification of responses is needed.

Sincerely,

/s/ Jim Morgan
Jim Morgan, President
Morgan Environmental Consulting, Inc.

DRAFT
DEED OF CONSERVATION EASEMENT

EASEMENT DEED WITH MITIGATION DUAL GRANTEES; PHASES

DEED OF CONSERVATION EASEMENT

THIS DEED OF CONSERVATION EASEMENT is given this day of 199 by

Orlando, Florida 328 ("Grantor") to the Water Management District and The City of ("Grantees").

WITNESSETH

WHEREAS, the Grantor is the owner of certain lands situated in Orange County, Florida, and more specifically described in Exhibit "A" attached hereto and incorporated herein ("Property"); and

WHEREAS, the Grantor desires to construct ("Project") at a site in Orange County, which Project in its several phases may impact wetlands under the regulatory jurisdiction of Water Management District ("District"); and

WHEREAS, District Surface Water Management Permit Number Unknown ("SUM Permit No.") authorized such impacts to wetlands on the Project site and WHEREAS, Permit Number Unknown requires the Grantor provide compensation and/or mitigation for impacts to wetlands under Water Management

District's jurisdiction occurring on the Project site within Orange County; and

WHEREAS, the Grantor has proposed to set aside as part of the permit conditions a conservation tract and upland conservation buffers involving preservation of certain wetland systems on the Property; and

WHEREAS, the Grantor, in consideration of the consent granted by SUM Permit Number Unknown is agreeable to granting and securing the Grantees the enforcement of a perpetual conservation easement as defined in Section 704.06, Florida Statutes (1991), over the Property.

NOW, THEREFORE, in consideration of the issuance of SUM Permit Number Unknown and its conditions to construct and operate the Project or causes the Project to be operated and maintained. Grantor hereby grants, creates, and establishes a perpetual conservation easement for the Grantees upon the Property which shall run with the land and be binding upon the Grantor, its heirs, successors, and assigns, and remain in full force and effect forever.

The scope, nature, and character of this conservation easement shall be as follows:

1. It is the purpose of the conservation easement to ensure that no activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, wetlands or fish and wildlife habitat preservation are undertaken on the Property.

To carry out this purpose, the following rights are conveyed to Grantees by this easement:

a. To enter upon the Property at reasonable times to enforce the rights herein granted upon prior notice to Grantor, its heirs, successors, or assigns, in a manner that will not unreasonably interfere with the use and quiet enjoyment of the Property by Grantor, its heirs, successor, or assigns, at the time of such entry; and

b. To enjoin any activity on or use of the Property that is inconsistent with the purpose of this conservation easement and to enforce the restoration of such areas or features of the Property that may be damaged by any inconsistent activity or use.

2. The following activities are prohibited in or on the Property:

a. Construction or placing of buildings, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground.

b. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, water or unsightly or offensive materials.

c. Removal or destruction of trees, shrubs, or other vegetation.

d. Excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance in such manner as to affect the surface.

e. Surface use except for purposes that permit the land or water area to remain predominantly in its natural condition.

f. Activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat preservation.

g. Acts or uses detrimental to such retention of land or water areas.

h. Acts or uses detrimental to the preservation of the structural integrity or physical appearance of sites or properties of historical, architectural, archaeological, or cultural significance.

3. Grantor reserves to itself, its heirs, successors, or assigns all rights as owner of the Property, including the right to engage in all uses of the Property that are not prohibited herein.

4. No right of access by the general public to any portion of the Property is conveyed by this conservation easement.

5. Grantor or its assigns shall indemnify and hold Water Management District harmless from all costs related to operation, upkeep and management of the property.

6. Grantor or its assigns shall pay any and all real property taxes and assessments levied by competent authority on the Property.

7. Any costs incurred by Grantee in enforcing, judicially or otherwise, the terms and restrictions of this conservation easement against Grantor, its heirs, successors, or assigns, shall be borne by and recoverable against Grantor, its heirs, successors, or assigns as long as Grantee is the prevailing party in such proceedings.

8. Enforcement of the terms and provisions of the conservation easement shall be at the reasonable discretion of Grantees, and any forbearance on behalf of Grantees to exercise its rights hereunder in the event or any breach hereof by Grantor, its heirs, successors, or assigns, shall not be deemed or construed to be a waiver of Grantees' rights hereunder in the event of a subsequent breach.

9. Grantees will hold this conservation easement exclusively for conservation purposes.

10. If any provision of this conservation easement or the application thereof to any person or circumstances is found to be invalid, the remainder of the provisions of this conservation easement and the applications of such provision to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby, as long as the purpose of the conservation easement is preserved.

11. All notices, consents, approvals, or other communications hereunder shall be in writing and shall be deemed properly given if sent by United States Certified Mail, Return Receipt Requested, addressed to the appropriate party or successor-in-interest.

12. The terms, conditions, restrictions, and purposes of this conservation easement shall in inserted by Grantor in any subsequent deed or other legal instrument by which Grantor divests itself of any interest in the Property. Any future purchaser of the Grantor's interest in the Property shall be notified in writing by Grantor of this conservation easement.

13. This conservation easement may be amended, altered, released, or revoked only by written agreement between the parties hereto or their heirs, assigns, and successors-in-interest.

TO HAVE AND TO HOLD unto Grantees, their successors and assigns forever. The covenants, terms, conditions, restrictions, and purposes imposed with this conservation easement shall not only be binding upon Grantor, but also its agents, heirs, assigns, and all other successors to it in interest, and shall continue as a servitude running in perpetuity with the Property.

IN WITNESS WHEREOF, WITNESS HAS EXECUTED THE EASEMENT BY THE AUTHORIZED REPRESENTATIVES DESIGNATED BELOW, this _____ day of _____, 199__

~~FIRST EQUITY DEVELOPMENT GROUP, INC.~~
~~HARBAGE AND ASSOCIATES, INC.~~
~~A JOINT VENTURE~~

_____

~~W. ROGER SMITH~~ – PRESIDENT
~~FIRST EQUITY DEVELOPMENT GROUP, INC.~~

_____

[~~ILLEGIBLE~~] – PRESIDENT
~~HARBAGE AND ASSOCIATES, INC.~~

Signed, sealed and delivered in our presence as witnesses.

_____

Printed Name: _____

_____

Printed Name: _____

STATE OF FLORIDA
COUNTY ORANGE

On this _____ day of _____, 19_____ before me, the undersigned Notary Public, personally appeared
both personally known to me to be the person who subscribed to the foregoing instrument and did not take an oath, as the
respectively, Florida Corporations, and acknowledged that they executed the same on behalf of said corporation and that they were duly authorized to do so.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

_____

[~~ILLEGIBLE~~]
STATE OF FLORIDA
MY COMMISSION EXPIRES:

_____

Ex. 63

BDA
ENVIRONMENTAL CONSULTANTS

May 15, 2001
File: 2001-075-10.1

Mr. Coy A. Koontz
Post Office Box 540845
Merritt Island, Florida 32954
Phone: 321-452-5389
Fax: 321-452-5389

RE: Environmental Constraints Analysis for the Highway 50 15±-Acre Parcel

Dear Mr. Koontz:

Pursuant to our May 8, 2001 workscope approval for environmental services, Breedlove, Dennis & Associates, Inc. has completed Task No. 1, consisting of an evaluation of general site conditions and determination of wetland areas. This included a determination of the approximate extent and type of any on-site wetlands and uplands and an evaluation for the occurrence or potential occurrence of any Threatened or Endangered (T&E) species. This summary report of findings represents a documentation of our environmental evaluation.

Location and Site Conditions

The Highway 50 15±-acre parcel is located in Section 23, Township 22 South, Range 31 East, Orange County, Florida (Exhibit 1). More specifically, it is located just south of Highway 50 and a little east of

the junction of Highway 438 (East/West Expressway) and Highway 50.

The property is broken into two parcels by a high-tension power line right-of-way (ROW). The smaller 4±-acre northern parcel extends south from Highway 50 to the south side of the ROW and the larger 11±-acre parcel extends from there south for about 800 feet (Exhibit 1).

Exhibit 2 demonstrates the distribution of soils that have been mapped for the project area. The soil in the central forested wetlands is mapped as Samsula muck (42). These soils are composed of deep, saturated muck over much of this area. The soils supporting the Pine Flatwoods (411) on the north part of the site are mapped as Smyrna fine sands (44), an upland pine flatwoods soil. The soils mapped for the very southeastern part of the site are Pomello and Smyrna fine sands. These again are flatwoods soils. There is some Bassinger fine sands, depressional (03) in the wetlands along the western side of the site.

The northern area, north of the power line, is composed of Pine Flatwoods (411) and Wetland Forested Mixed (630) (Exhibits 3 and 4). The very northern part of this parcel has a cul-de-sac roadway [Roads and Highways (814)] and some Open Area (191). The southern part of this area is in a power line ROW with high-tension lines running through it. The open land at the north and the roadway are uplands. The flatwoods on the eastern side of this area are dominated by longleaf pine (*Pinus palustris*) with laurel

oak (*Quercus laurifolia*) and red maple (*Acer rubrum*) in the subcanopy. The groundcover consists of a dense layer of saw palmetto (*Serenoa repens*). The soils are Smyrna fine sands (44) (Exhibit 2). To the west of this land cover is an area of Wetland Forested Mixed (630) that does not have its groundcover dominated by saw palmetto. Its soils are a hydric inclusion and its canopy and subcanopy is dominated by pond pine (*Pinus serotina*), red maple, laurel oak, and dahoon holly (*Ilex cassine*). Its groundcover has cinnamon fern (*Osmunda cinnamomea*) and patches of saw palmetto. To the west of this land cover is another patch of pine flatwoods dominated by longleaf pine and pond pine with a subcanopy of red maple and dahoon holly. The presence of transitional wetland-type species, pond pine, dahoon holly, red maple, and potentially hydric soils, make this a somewhat transitional area, but it is judged at this time to meet the overall criteria to be considered an upland. The area west of this flatwoods is a Wetland Forested Mixed (630) with a canopy and subcanopy dominated by pond pine, red maple, cypress (*Taxodium* sp.), dahoon holly, and laurel oak. A power line ROW lies along the southern part of this parcel. Its eastern part, classified as a Cover Type 832 (Electrical Power Transmission Line), is an upland herbaceous area that is distinguished from the eastern non-forested wetland part of the power line ROW. A ditch lies generally along the western border of this part of the parcel and the one to the south.

The larger 11±-acre parcel to the south is broken into three land cover areas. The northwestern part of this parcel is a Pine Flatwoods (411) that is very similar to the one to its north, across the power line. It's canopy is dominated by longleaf pine and pond pine. It has dahoon holly and red maple in its subcanopy. Its groundcover is heavily dominated by saw palmetto. This area was subjected to a low-level burn that removed the saw palmetto fronds. The fronds have regrown, but the area is not as thick as it was prior to the fire. The fire likely occurred within the last year or so. This area is on the borderline of being classified as a wetland due to its pond pine, dahoon holly, red maple, and borderline soils. The largest part of this parcel is dominated by a mixed hardwood wetland forest. This forest consists of slope forests of pond pine, red maple, loblolly bay (*Gordonia lasianthus*), and cinnamon fern. This grades on into a sweetbay (*Magnolia virginiana*), swamp tupelo (*Nyssa sylvatica*), red maple, lizard's tail (*Saururus cernuus*), and wax myrtle (*Myrica cerifera*) wetland that has saturated or inundated Samsula Muck soils. A creek with running water passes through this area. The land cover on the southeastern part of the site is Pine Flatwoods (411) dominated by a canopy of longleaf pine and a groundcover of dense and robust saw palmetto. The cinnamon fern in the groundcover of the slope pond pine wetland forest changes to bracken fern (*Pteridium aquilinum*) in this area. The soils of this area include Pomello fine sand (34) and Smyrna fine sand (44), two upland pine flatwoods soils.

The Florida Land Use, Cover and Forms Classification System map was prepared to document the distribution and variation in upland and wetland plant communities and related cover types within the property (Exhibits 3 and 4). The property has the Highway 50/Highway 438 complex to its north and northwest. Development has moved in to its southeast and will likely soon move in from the east. Most of the site borders on other forested and wetland areas.

Wetland Jurisdictional Regulatory Review

A thorough analysis was conducted throughout the entire property to determine the occurrence and approximate extent of wetland areas potentially regulated under federal, state, or local regulations. As a result of the analysis, it has been determined that there are several wetlands on the site that are jurisdictional by one or more agencies. These wetland areas are shown in Exhibit 4, indicated by 600 services cover types, with information regarding their approximate acreages.

The wetlands are mostly forested wetlands. The largest wetland is a Mixed Wetland Hardwoods (617) that covers about half the site. This wetland is jurisdictional by the Department of the Army, Corps of Engineers (ACOE), the St. Johns River Water Management District (SJRWMD), and Orange County. The Wetland Forested Mixed (630) at the northwestern corner of the site is connected to the central

wetland by the ditch that runs along the western border so is also jurisdictional by all three agencies. The herbaceous wetland on the eastern end of the power line ROW is connected to the central wetland and thus is also jurisdictional by all three agencies. The Wetland Forested Mixed (630) in the center of the northern parcel is possibly isolated but is also jurisdictional by the three agencies.

The total of the approximate acreage of wetlands within the 15±-acre parcel, is approximately 8.3 acres. The approximate acreage of wetlands within the 4±-acre northern parcel is 0.8± acre. This is based on our field review of the site and photo delineation of the approximate wetland boundaries pursuant to current regulatory criteria. The 1±-acre Pine Flatwoods (411) in the center of this area is at risk of being claimed as a jurisdictional wetland by one or more agencies but we do not believe that it meets the wetland delineation criteria. The 2±-acre flatwoods in the northwestern corner of the southern 11±-acre parcel is similar in nature to the above area and may also be at risk of being claimed as a jurisdictional wetland. All of the wetland areas would be considered subject to jurisdiction by the ACOE, SJRWMD, and Orange County (Orange County Planning Department).

Potential for Threatened or Endangered Species

A preliminary evaluation was conducted on the property to determine the presence or potential for

presence of any state or federally listed T&E species. Representative portions of the predominant vegetation cover types throughout the property were inspected in order to determine the possible presence or the signs of occurrence for such protected species. This included the upland areas and wetland areas. As a result of the on-site evaluation, the only listed plant species that was observed is the epiphytic greenfly orchid (*Epidendrum conopseum*) that is listed by the state as economically exploited. The potential for occurrence of any federally listed plant species is considered minimal. Observations within the upland portions of the property resulted in no observation of any signs of the presence of the gopher tortoise (*Gopherus polyphemus*), a common Species of Special Concern (SSC). No state or federally listed T&E, animal or plant, SSC or sign of their presence were observed on the site. Florida Fish and Wildlife Conservation Commission's bald eagle (*Haliaeetus leucocephalus*) database indicates that no eagle nest is within two miles of the site; therefore, this protected species should not pose any development constraints at this time.

Summary

The preceding information is based upon our on-site investigation and current regulatory criteria and policy related to wetland issues and protected species issues. The wetland boundaries we have analyzed are represented in this report by appropriate photointerpreted lines, which have not been

agency-verified. Although we believe these wetland boundaries to be reasonably accurate and useful for your early planning decisions, please be aware that portions of these wetland boundaries could be subject to some change pursuant to regulatory agency inspection and final approval.

We appreciate the opportunity to provide you with these services. Should you have questions or require any additional information regarding the evaluation in this report, please contact us.

Sincerely yours,

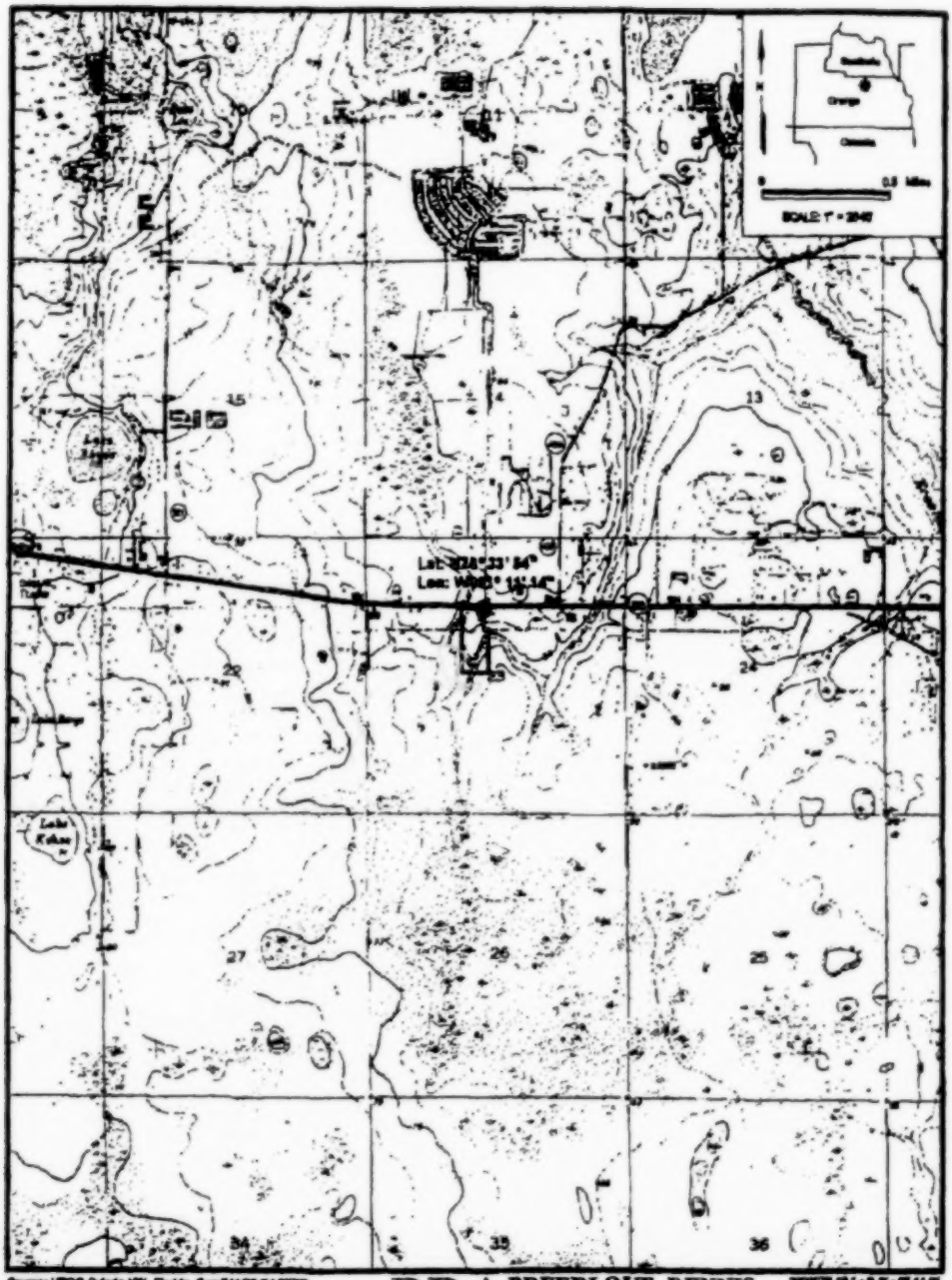
/s/ Joe B. Birch
Joe B. Birch, Ph.D.
Senior Scientist

/s/W. Michael Dennis
W. Michael Dennis, Ph.D.
President

JBB/WMD/smc

Enclosure

The ecological constraints documented in this report such as environmental regulatory matters, wetland jurisdiction, wetland permitting, wetland mitigation requirements, water quality, and threatened and/or endangered species, are provided based on data, site conditions, and information available on the date of our site review. This information is for general planning purposes only, and should not be used as a final determinant of regulatory agency position or final development potential. The extent of agency wetland jurisdiction can be determined through field location of the wetland limits and on-site agency review of those limits.

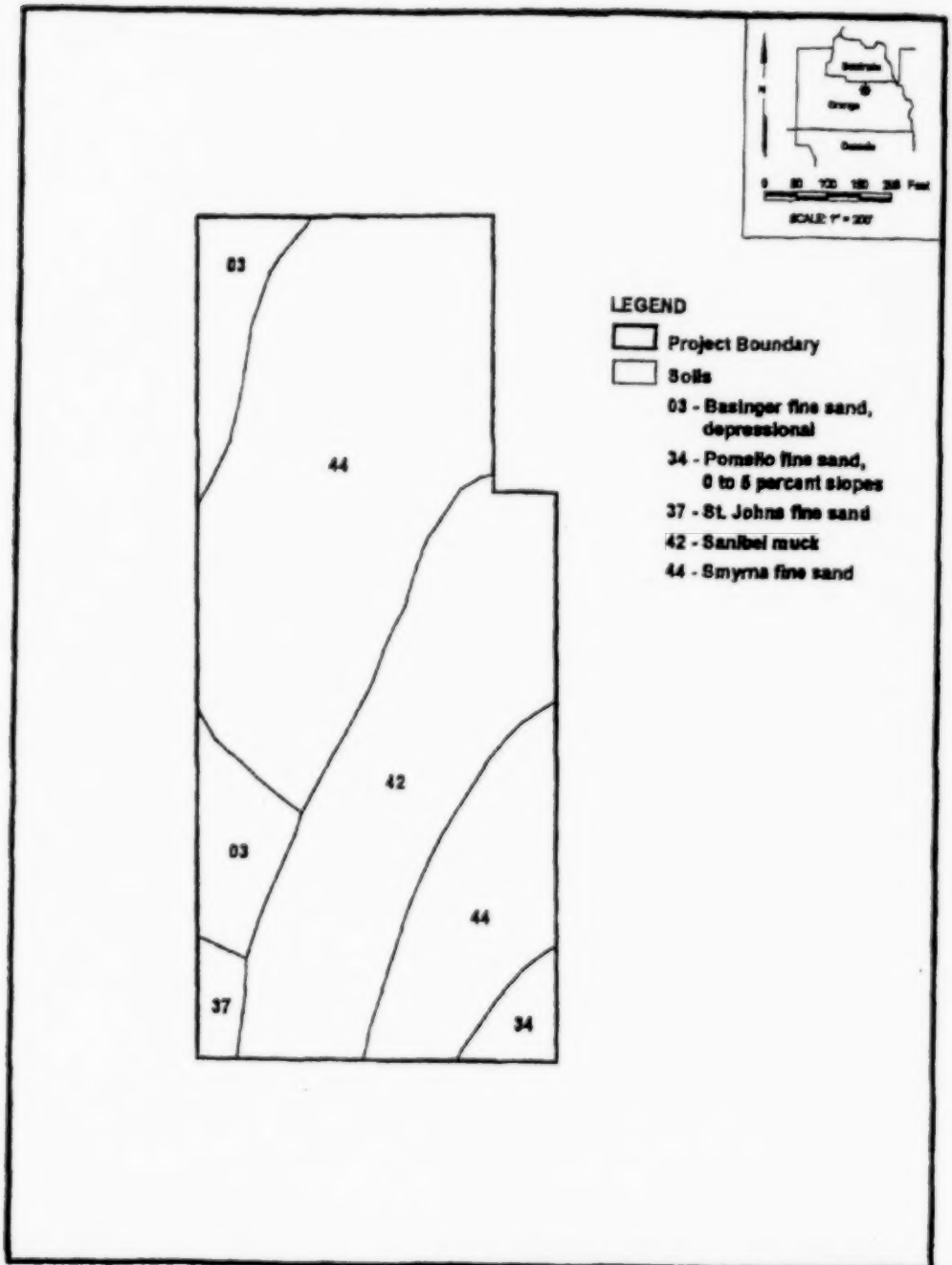


Source: USGS Oviedo NW, Florida, 7.5 MINUTE RASTER digital quads, ©1997. Project boundary based on site plan by The CHI Design Group, Inc., 05/02; location approximated by BDA.

BDA BREEDLOVE, DENNIS & ASSOCIATES, INC.
330 W. Canton Ave., Winter Park, FL 32789 P: 407-677-1882 F: 407-657-7008

EXHIBIT 1 LOCATION OF THE 15-ACRE EAST HIGHWAY 50 PROJECT SITE (SECTION 23, TOWNSHIP 22 S, RANGE 31 E), ORANGE COUNTY, FLORIDA.

Ex. 71



Source: Florida Geographic Data Library, USDA-NRCS, 1995. Soil Survey Geographic (SSURGO) Database.

BDA BREEDLOVE, DENNIS & ASSOCIATES, INC.
330 W. Canton Ave., Winter Park, FL 32789 P: 407-677-1882 F: 407-657-7006

EXHIBIT 2 NATURAL RESOURCES CONSERVATION SERVICE SOILS MAP OF THE 16-ACRE EAST HIGHWAY 50 PROJECT SITE, ORANGE COUNTY, FLORIDA.

Ex. 72

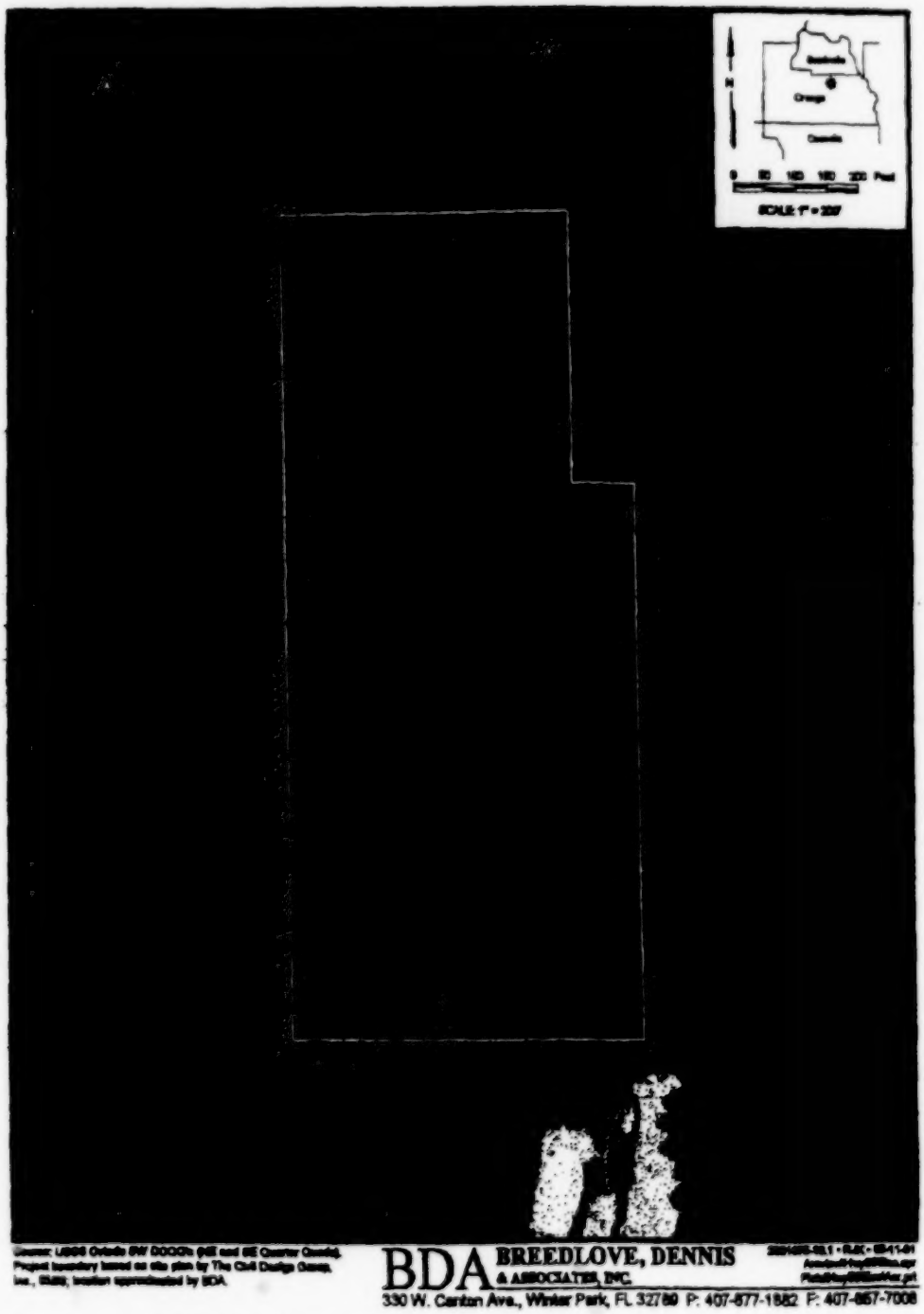
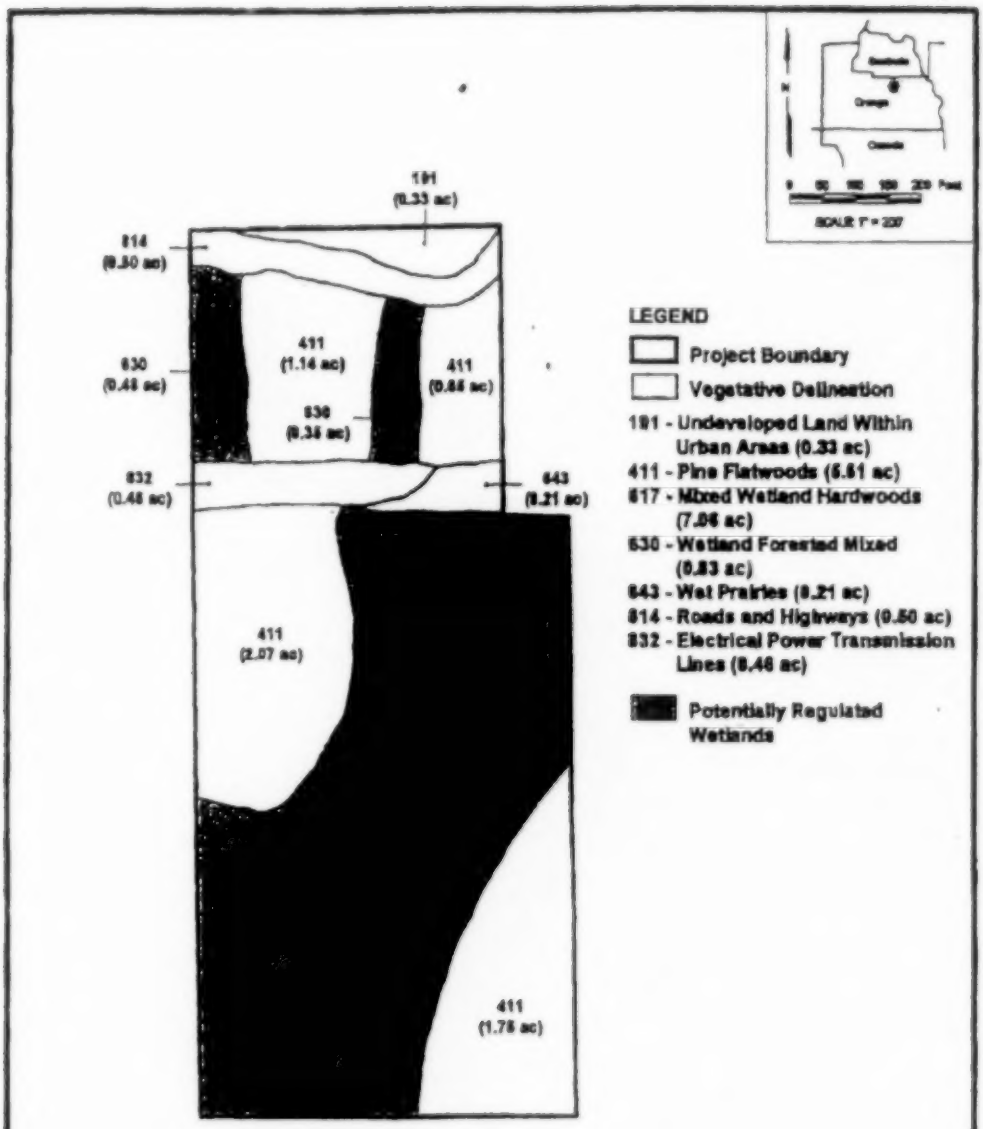


EXHIBIT 3 AERIAL OF THE 15-ACRE EAST HIGHWAY 50 PROJECT SITE, ORANGE COUNTY, FLORIDA.

Ex. 73



Source: Vegetative delineation based on photointerpretation and selective groundtruthing by BDA, 05/01.

BDA BREEDLOVE, DENNIS & ASSOCIATES, INC.
330 W. Canton Ave., Winter Park, FL 32789 P: 407-677-1882 F: 407-657-7006

EXHIBIT 4 FLORIDA LAND USE, COVER AND FORMS CLASSIFICATION SYSTEM MAP FOR THE 15-ACRE EAST HIGHWAY 50 PROJECT SITE, ORANGE COUNTY, FLORIDA.

Ex. 74

Ex. 75

[LOGO]
JCB CONSTRUCTION incorporated

August 5, 2002

St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177
ATTN: Mr. William H. Congdon
Deputy General Counsel

Re: Hal Scott Preserve, Improvements

Dear Mr. Congdon,

At Paul Roper's request, I visited the Hal Scott Preserve with Elizabeth Johnson Arnold of the St. John's River Water Management District. Ms. Arnold pointed out two locations and asked me to determine the feasibility and cost of removal of a culvert at one location and the feasibility and cost of installation of a culvert at the second location. I determined that removal and installation of the culverts was technically feasible.

The total cost for removal and installation of the culverts if JCB Construction, Inc. were to perform the work today would be $10,913. The cost breakdown for each location is as follows:

Culvert Removal	
Culvert Removal	$ 830.00
Backfill, Grade	$ 440.00
Grass Disturbed Area	$ 345.00

Build Up Low Area	
Just north of canal	$2,540.00
Grass Built-Up Area	$1,505.00
TOTAL	**$5,660.00**
Culvert Installation	
Labor:	$1,384.00
Equipment:	$2,643.00
Material:	$1.226.00
TOTAL	**$5,253.00**

The construction costs in 1994 would have been approximately 11% less than the amounts shown above.

Thank you for allowing me to provide this service. Please contact me with questions.

Sincerely,

/s/ Gratten White

Gratten White
Vice President
pr/gw

CC: Clayton, Roper and Marshall
ATTN: Mr. John T. Speer
246 Westmonte Drive
Altamonte Springs, FL 32714

Ex. 77

[SEAL] *Florida Department of Environmental Regulation*
Twin Towers Office Bldg. • 2600 Blair Stone Road • Tallahassee, Florida 32399-2400
Bob Martinez, Governor Dale Twachtmann, Secretary John Shearer, Assistant Secretary

MEMORANDUM

TO: Randy Armstrong, Director, Division of Permitting

FROM: Dale Twachtmann, Secretary

DATE: June 20, 1988

SUBJECT: Policy For "Wetlands Preservation-as-Mitigation"

Recently, the Department has had several situations in which applicants have offered to donate off-site wetlands to the state, or convey certain property rights to preserve them, as mitigation for dredge and fill impacts. Thus, the need for sound rationale and policy to evaluate these proposals has become apparent.

The present written guidelines (Armstrong memo of April 30, 1987) regarding these proposals allows the preservation of certain on-site wetlands as mitigation under two circumstances:

1. If a project under consideration would be unpermittable because of possible cumulative impacts, it may be appropriate to consider a conveyance of interest in land as mitigation. The lands conveyed would offset or prevent possible future impacts.

2. A conveyance mechanism would be an appropriate vehicle for mitigation when it would preclude development in wetlands or damages to wetlands otherwise unprotected by the regulatory processes in the Henderson Act.

In each situation the proposed conveyance and preservation must also fulfill other requirements of the statutory guidance provided for consideration of mitigation proposals, that is, it must offset the adverse impacts that make the proposed dredge and fill project not permittable. However, the present guidelines do not address how the department would evaluate such a proposal, such as environmental quality of the preservation parcel; type of instrument of conveyance; how much of the total mitigation the proposed preservation may offset; or other similar evaluation rationale. This memorandum establishes such a process.

The first step in determining how a conveyance for wetlands preservation should be evaluated as mitigation is to determine when preservation should be considered as a mitigation option. Historically, preservation has been used only after on-site wetland creation and/or enhancement has not been enough to tip the balancing test "scales" in favor of issuance. That will continue to be our policy.

Nevertheless, my experience in serving on the Land Acquisition Selection Committee of the Conservation and Recreation Lands Program (CARL) has shown

that the state is paying high prices for environmentally unique and threatened lands and if it is possible to obtain similar lands by donation – as mitigation – it is environmentally and economically necessary to seriously consider it. So, with the conditions described herein, we will consider such offers.

The following factors are to be used in determining whether or not it is appropriate to accept a conveyance and to establish its value:

1. Whether or not the parcel is under consideration for purchase and management as a conservation area or is immediately adjacent to one, or is of such high quality as to provide clear benefit to the state as preserved land;

2. The current degree of threat to the parcel. For example, is it within the dredge and fill permitting jurisdiction of the Department? Are the present owners holding it for preservation; or development? Is the parcel vulnerable to direct or adjacent development?

3. The proximity of the parcel to the site of the project for which mitigation is required;

4. What is the quality of the conveyance instrument – fee simple? conservation easement?; and the status of other incumberances, such as mineral rights.

5. Is the parcel within, near or adjacent to any waters with a special designation such

as parks, aquatic preserves and Outstanding Florida Waters?

6. The condition of the property as a result of previous activities, such as the disposal of hazardous or solid waste.

Once the decision is made that the conveyance is appropriate the following additional factors are used to establish its relative value:

- The relative rarity of the habitat on the parcel
- Presence and type of existing management authority
- Level of invasion of nuisance or exotic species
- Its drainage basin and existing drainage patterns
- Relative proximity to existing or anticipated activity that would effect its environmental value.
- Existing water quality
- Presence of threatened and endangered species
- Presence of feral animals that would affect resources
- Presence of historic or archeological sites
- The hydrological importance of the surface and groundwater at that location.
- The configuration of the parcel

Determination of a mitigation ratio for any proposed land must include a comparison between the quality and level of wetland function being provided by the project site vs. that available on the offered land.

Our current ratios for "created" mitigation now usually range from less than 1:1 up to 5:1 because the success rate in planting is often not good. "Enhancement" mitigation ratios usually range from 4:1 to 20:1 because the wetlands prior to enhancement were already providing some wetland functions and the enhancement only adds a certain percentage of increased usefulness.

Since the conveyance of property for mitigation presumes that the environmental resources of the land – whether wetland or upland – are reasonably intact and would be protected we know what we are getting and the risk is much reduced. Thus, the ratios for these conveyances can be done with more confidence than "created" or "enhanced" projects. However, we must not set ratios so low that the modification, planting, and enhancement opportunities on the project site are ignored because conveyance mitigation is easier to do. So, as stated above, since creation and enhancement projects provide more immediate and direct on-site benefits we will continue to require a look at those options first.

It then follows that, in keeping with the ratios and premises discussed above, the highest quality conveyance – considering all the factors described in this memo – will not be granted a ratio lower than 10:1.

The lowest quality conveyance is considered to be 100:1 – as a number larger than that would indicate that such conveyance is an inappropriate method of mitigation.

This policy can be used effective this date.

Ex. 83

WETLAND RESOURCE MANAGEMENT
TECHNICAL STAFF REPORT
May 9, 1994

APPLICANT: Coy Koontz
120 Ensenada Drive
Orlando, Florida 32825

AGENT: The Civil Design Group, Inc.
Attn: William Fogle, P.E.
401 South Rosalind Avenue, Suite 200
Orlando, Florida 32801

COUNTY: Orange
SECTIONS: 23
PROJECT NAME: Coy A. Koontz
TOWNSHIP: 22 South
RANGE: 31 East
ACRES OWNED: 14.9
PROJECT ACREAGE: 14.9

AUTHORITY: Chapters 17-4, 17-301, 17-302, 17-312, Florida Administrative Code ("F.A.C.") and Part IV, Chapter 373, Florida Statutes

GENERAL DESCRIPTION OF APPLICATION NO. 12-095-0109A:

This application is for the placement of 16696.00 cubic yards of fill material in 3.4 acres of waters of the state wetlands for the construction of an unspecified proposed commercial development.

RECEIVING WATER BODY(ies): A tributary (Class III) of the Econlockhatchee River (Class III/Outstanding Florida Water ["OFW"])

AQUATIC PRESERVE: N/A

STAFF COMMENTS:

Project Site

The proposed Coy A. Koontz project is located south of S.R. 50 (Colonial Drive), just east of the Eastern Extension of the East-West Expressway, in eastern Orange County. (See attachment A.) The project site is currently undeveloped. The surrounding areas are urbanizing through residential, business park, and commercial developments. The project is located within the Econlockhatchee River Hydrologic Basin, and is located almost entirely within the Riparian Habitat Protection Zone ("RHPZ"). See, Rule 40C-41.063(5)(d)1, F.A.C.

The northernmost part of the project site consists of 1.3 acres of upland (0.5 acre of non-RHPZ upland and 0.8 acre of RHPZ upland). In the northernmost part of the project, a paved road accounts for 0.4 acre of RHPZ upland and an adjacent grassy right-of-way accounts of 0.5 acre of non-RHPZ upland. This upland area is bordered to the south by 11.8 acres of forested and herbaceous wetlands of a tributary to the Econlockhatchee River. In the southeastern corner of this rectangular shaped project site is 1.8 acres of forested upland (0.6 acre is RHPZ upland; 1.2 acre is non-RHPZ upland).

Wildlife Habitat

The 2.2 acres of forested uplands are vegetated with mature canopy of longleaf pine with dense saw palmetto understory. The wetland component of the RHPZ includes a tributary to the Econlockhatchee

River. The on-site wetland consists of a diverse mixture of vegetative communities: 10.9 acres of mature, forested wetlands, and 0.9 acre of herbaceous wetlands. The higher elevations of the wetland consist of a seepage slope area, vegetated with pond pine and loblolly bay trees. There is a groundcover of dense saw palmetto. As the wetland elevation decreases, there is an herbaceous area. The herbaceous portion of the wetland is located in an existing powerline easement. Historically, the area under the powerline easement was deforested and has been maintained as such by the power company. The vegetative community within the powerline easement includes red root, rush fuirena, guinea grass, saw grass and red top panicum. The lowest elevation of the wetland is a mixed hardwood system with a mature canopy of loblolly bay, red maple, southern magnolia, laurel oak, water oak, and dahoon holly.

Collectively, these different vegetative wetland communities provide a diversity of habitat and food sources, and serve as an important refuge for a variety of wildlife species within this area the Econlockhatchee River Hydrologic Basin. The resting, breeding, foraging, and nesting requirements of many wildlife species are met in these wetlands.

A total of 3.4 acres of wetlands, consisting of the entire seepage zone and herbaceous wetland zone, and a narrow strip of the mixed hardwood zone are proposed to be filled for the construction of portions of a surface water management pond and parking area for a commercial development. The proposed project

will displace natural wildlife habitat and cause adverse effects to fish and other wildlife species.

Water Quality

The applicant has demonstrated that the proposed loss of wetlands will not adversely affect water quality downstream during construction. This assurance has been provided by the proposed implementation of appropriate sediment and erosion controls that include soil stabilization, and the use of hay bales and silt screens. Accordingly, the proposed project is consistent with Rule 17-312.080(1), F.A.C.

Public Interest Test

The applicant must meet the public interest test pursuant to Rule 17-312.080(2), F.A.C. The seven criteria of this test are set forth below:

> Whether the project will adversely affect the public health, safety; or welfare or the property of others.
>
> Whether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species or their habitats.
>
> Whether the project will adversely affect navigation or the flow of water or cause harmful shoaling.

Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project.

Whether the project will be of a temporary or permanent nature.

Whether the project will adversely affect or enhance significant historical and archeological resources under the provisions of Section 267.061, Florida Statutes.

The current condition and relative value of functions being performed by areas affected by the proposed activity.

Applying these criteria to the proposed project, staff determined that the proposed project would displace natural wildlife habitat and cause adverse impacts to the conservation of fish and wildlife through the loss of 3.4 acres of wetlands. Additionally, the current condition and relative value of functions being performed by the wetlands will be adversely affected by the proposed activity. Balancing the public interest criteria clearly indicate that without an adequate mitigation plan the proposed project is contrary to the public interest.

Reduction of Wetland Impacts

To reduce the proposed wetland impact and in accordance with Rules 17-312.060(10) and 17-312.300(3), F.A.C., staff suggested a number of practicable design modifications to reduce the impacts to wetlands on this project. Staff suggested a modification to the

proposed filling of part of the site for the construction of a dry-bottom retention/detention pond. The modification would employ a subsurface stormwater management system constructed under a portion of the project site. Staff also suggested reducing wetland impacts through elimination of the proposed fill in the side-slope areas and replacing these with stem walls. The applicant did not respond in writing to the staff's suggestions of modifications. Rule 17-312.060(10) requires the applicant to respond, in writing, as to whether or not the identified modification to the proposed project is practicable and whether the applicant will make the identified modification. The applicant was unwilling to make any modifications to sufficiently reduce the impacts of the project.

Cumulative Impacts

In determining whether to grant or deny a wetland resource management permit, staff considers: (1) the impact of the project for which the permit is sought; (2) the impacts of projects which are existing or under construction or for which permits or jurisdictional determinations have been sought; and (3) the impact of projects which are under review, approved or vested pursuant to Section 380.06, Florida Statutes, or other projects which may reasonably be expected to be located within the jurisdictional extent of waters, based upon land use restrictions and regulations. See, Rule 17-312.060(10), F.A.C. Property with similar configuration characteristics, as well as similar or shared wetland systems, occur within the same

drainage basin of the proposed project. The applicant failed to provide reasonable assurance that the project under review, when considered with projects which may reasonably be expected to be located within the jurisdictional extent of waters, will not result in unacceptable cumulative impacts upon wetland functions.

Mitigation for the Loss of Wetland Habitat

To offset the proposed loss of functions currently provided by the 3.4 acres of wetlands to wildlife, the applicant has proposed, as mitigation, to place the remaining undeveloped 9.2 acres of RHPZ and the 1.2 acres of uplands adjacent to the RHPZ in a conservation easement.

Chapter 17-312, Part III, F.A.C., establishes criteria to be followed in evaluating proposals to mitigate the adverse effects of dredging and filling in waters of the state that cause a project not to be permittable. Staff has evaluated the proposed mitigation plan to determine if the proposal will provide the required reasonable assurances. As stated above, staff indicated to the applicant that a reduction of the wetland encroachments would reduce the amount of mitigation that would be needed. However, the applicant was unwilling to make any modifications to reduce the wetland encroachments.

Based on the high quality of the wetlands, and the impacts proposed to these areas, the proposed on-site mitigation is inadequate and therefore, the project

fails to meet the requirements of Rules 17-312.080(2) and 17-312.340, F.A.C. The applicant's mitigation plan fails to offset the loss of habitat the would be caused by the project.

Staff suggested several off-site alternatives to on-site mitigation, including restoration, enhancement, and preservation. However, the applicant was unwilling to consider any additional mitigation options other than what was originally proposed.

Nevertheless, off-site mitigation enhancement options are available within the Econlockhatchee River Drainage Basin. For example, within the Hal Scott Preserve there are existing road systems in the wetlands that require the replacement of approximately 15 inoperative or abandoned culverts. Replacement of the culverts would enhance the wetland functions to wildlife in the Preserve by maintaining the hydrologic capabilities of the wetland system as well as eliminate any existing or potential sedimentation problems. Additionally, there are several ditches constructed in uplands within the Preserve that hydrologically and vegetatively connect isolated wetlands to the Econlockhatchee River. These ditches have altered the natural hydroperiod of the wetlands. Plugging or eliminating the ditch system would help rehydrate all or some of the affected wetland systems.

Another off-site mitigation enhancement option is available on the Demetree property. On this property there is a series of ranch ditches in the uplands that connect several wetlands together. The ditch system

discharges directly into the Econlockhatchee River. This ditch system has altered the natural hydroperiod of the wetland systems. Plugging or eliminating the ditch systems would aid in rehydrating all or some of the affected wetland systems, and therefore enhance the wetland functions to wildlife. Implementation of one or more of the off-site mitigation alternatives could offset the proposed impacts of the project site and make the project, as proposed, permittable.

If the applicant supplemented its on-site mitigation plan with an off-site enhancement mitigation option which included a total of at least 50 acres of wetland enhancement on either of the two referenced example sites, such an approach would sufficiently mitigate for the impacts proposed in this application. A combination of enhancement activities on both of these example sites, totalling 50 acres of wetland enhancement would also be acceptable. Equivalent off-site enhancement options on other properties within the basin could also be developed.

As another option, the applicant's on-site mitigation proposal would be sufficient to mitigate for commercial development of smaller size on this site (assuming the relevant water quality and quantity were met). Specifically, the applicant could develop 0.7 of an acre of wetlands within the RHPZ for commercial development fronting S.R. 50, with mitigation for the wetland impacts in the form of a conservation easement or deed restriction consistent with Section 704.06, Florida Statutes, over the remaining

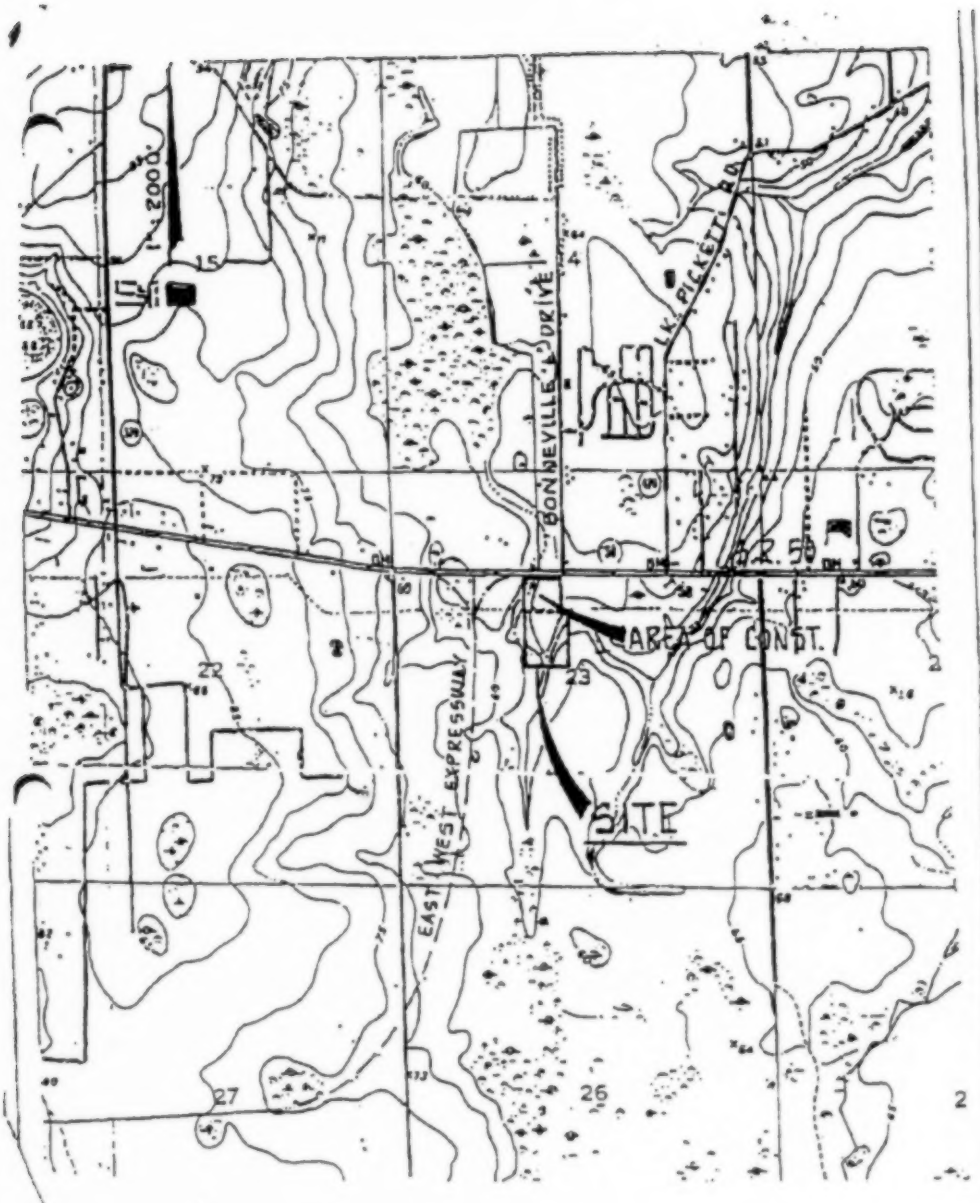
undeveloped wetlands and uplands (this excludes the 0.4 acre portion of paved road within the RHPZ and the 0.5 acre portion of right-of-way) on the project site.

Recommendation

The applicant has not provided reasonable assurance that the project is not contrary to the public interest, for the following reasons: (a) the applicant has refused to reduce impacts to wetlands through practicable design modifications; (b) the proposed filling will cause adverse impacts to the wetland habitat (including it's use to satisfy nesting, breeding and resting needs) of fish and wildlife, without sufficient mitigation therefor; and (c) the applicant has not provided reasonable assurances that the project will not cause cumulative impacts to wetland functions within the jurisdictional extent of waters. As presently proposed, the project fails to meet the requirements of Rules 17-312.080(2), 17-312.060(10), and 17-312.340, F.A.C. Accordingly, staff recommends that this application be denied.

RECOMMENDATION: DENIAL

BRABHAM/JOHNSON



G.S.
DO S.W. QUADRANGLE

CIVIL DESIGN GROUP INC. ENGINEERS · SURVEYORS · PLANNERS ORLANDO, FLORIDA	LOCATION MAP COY A. KOONTZ PROPERTY RANGE COUNTY, FLORIDA	FIGURE 1

A
17-005-0109A

Ex. 93

Defendant Ex. 28

* * *

normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas". This definition recognizes hydrology, vegetation, and soils as integral components of a wetland. Section 16 of this handbook describes the hydrologic, vegetative and soils indices used by the District.

10.7.4 Wetland Review Criteria

To determine whether a system will meet the objective contained in paragraph 9.1.1(j), the standard contained in paragraph 10.1.2(g), and that part of the criterion contained in paragraph 10.2.1(e) wetland functions, the District will consider only the impacts to fish and wildlife and threatened or endangered species relative to the functions the wetlands currently provide to them.

This assessment of impacts to wetland functions is based upon a review of pertinent scientific literature, soils and hydrologic information, and a general understanding of the ecological resources of the site. Generally, site specific biological data collection is not required. However, the applicant is required to quantify wetland impacts in acreage amounts. This generally demands the accurate delineation of wetlands pursuant to section 16.1, and characterization of these wetlands regarding their type and condition. Wetlands are delineated by the applicant.

These delineations are then verified for accuracy by District staff during the review of submitted permit applications. Applicants often request the District to confirm the accuracy of wetland delineations prior to the submittal of permit applications to facilitate planning and to expedite the permitting process. District staff will aid in these pre-application efforts to the extent that time allows and with the understanding that such verifications are informal, are subject to further consideration during application review, and are not binding upon the District until a permit has been issued. Applicants or potential applicants who wish to obtain a formal wetland determination that is independent of the permitting process, but which is binding upon the District and may be used in the preparation of permit applications, may petition the District for such a determination in accordance with section 16.2.

For the purpose of this rule, "threatened or endangered" species shall be those animal species listed in sections 39-27.003 or 39-27.004, F.A.C., and those plant species listed in paragraph 581.185(5)(a), F.S.

An applicant must provide reasonable assurances that a proposed system will not impact wetland functions so as to cause adverse impacts to:

(a) the habitat of fish, wildlife, and threatened or endangered species,

(b) the abundance and diversity of fish, wildlife, and threatened or endangered species, and

(c) the food sources of fish and wildlife, including those which are threatened or endangered.

The District exercises jurisdiction over "waters in the state", including wetlands whether they are isolated or not. An isolated wetland, per section 373.414, F.S., is a wetland not within the jurisdiction of the Department of Environmental Regulation for purposes of the regulation of dredging or filling. Provided the wetland is not used by threatened or endangered species, or reasonable scientific judgment does not indicate such use, it is presumed that an isolated wetland of less than one-half acre may be developed without the applicant providing reasonable assurance of compliance with paragraph. 9.1.1(j), paragraph 10.1.2(g), and that part of the criterion in paragraph 10.2.1(e) regarding wetland functions. This presumption of compliance with these provisions may be rebutted if the District, using the factors in subsection 10.7.5, determines that such isolated wetland is or several such isolated wetlands are cumulative, of more than minimal value to fish and wildlife. If the District rebuts the presumption, the applicant must provide reasonable assurance of compliance with the referenced standard and criterion, as explained in this subsection.

The criteria in this subsection are most easily satisfied if wetlands are not disturbed. Incorporation of wetlands into the surface water management system is the preferred alternative to destruction and mitigation provided the wetland criteria and water quality standards are met. If a system as initially proposed fails to meet wetland review criteria, the applicant may propose mitigation. The degree of impact to wetland functions, whether the impact to these functions can be mitigated (see subsection 16.1.3), and the feasibility of project design alternatives which could avoid impacts are all factors in determining whether a mitigation measure proposed by the applicant will be acceptable. The greater the functions the wetland provides and the higher the impact to these functions, the less the likelihood a mitigation measure can be proposed that will off-set the adverse impact to these functions and therefore the greater the likelihood that in order to receive District approval, an alternative project design which avoids the impact would need to be proposed. To receive District approval, a system can not cause a net adverse impact on wetland functions which is not off-set by mitigation.

* * *

of the bleed down device unless the applicant affirmatively demonstrates that greater depths will not inhibit the physical, chemical and biological treatment processes or cause the

resuspension of pollutants into the water column due to anaerobic conditions in the bottom sediments and water.

(6) are designed so the flow path through the pond has an average length to width ratio of at least 2:1. The alignment and location of inlets and outlets should be designed to maximize flow paths in the pond. If short flow paths are unavoidable, the effective flow path should be increased by adding diversion barriers such as islands, peninsula, or baffles to the pond. Inlet structures shall be designed to dissipate the energy of water entering the pond.

(7) are designed so that bleed down devices incorporating dimensions smaller than three inches minimum width or less than 20 degrees for "v" notches shall include a device to eliminate clogging. Examples of such devices include baffles, grates, and pipe elbows.

(8) are designed so that bleed down structure invert elevations are at or above the estimated post-development average water table elevation and above the anticipated post-development wet season tailwater elevation. If the structure is proposed to be set below the

average water table elevation, ground water inflow must be considered in the drawdown calculations, calculation of average residence time, and estimated normal water level.

(9) provide for permanent maintenance easements or other acceptable legal instruments to allow for access to and maintenance of the system, including the pond, littoral zone, inlets, and outlets.

11.4.4 Riparian Wildlife Habitat Standard

The wetlands abutting the Econlockhatchee River and its tributaries support an abundance and diversity, of aquatic and wetland dependent wildlife. Uplands abutting these wetlands protect the wetlands and provide important habitat for aquatic and wetland dependent species. Construction, alteration, operation, maintenance, removal or abandonment of surface water management systems within these wetlands and uplands can result in adverse changes in the habitat, diversity, abundance and food sources of aquatic and wetland dependent species. Implementation of these regulations should be done in a manner which encourages development of functional resource protection plans.

(a) The applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a system within the

following designated Riparian Habitat Regulation Zone will not adversely affect the abundance, diversity, food sources or habitat (including its use to satisfy nesting, breeding and resting needs) of aquatic or wetland dependent species:

1. The wetlands contiguous with the Econlockhatchee River and the following tributaries: Little Econlockhatchee River north of University Boulevard, Mills Creek, Silcox Branch (branch of Mills Creek), Mills Branch (branch of Mills Creek), Long Branch, Hart Branch, Cowpen Branch, Green Branch, Turkey Creek, Little Creek, and Fourmile Creek;

2. The uplands which are within 50 feet landward of the landward extent of the wetlands above; and

3. The uplands which are within 550 feet landward of the stream's edge as defined, for the purpose of this subsection, as the waterward extent of the forested wetlands abutting the Econlockhatchee River and the above named tributaries. In the absence of forested wetlands abutting these streams, the stream's edge shall be defined, for the purpose of this subsection, as the mean annual surface water elevation of the stream; however, if hydrologic records are

unavailable, the landward extent of the herbaceous emergent wetland vegetation growing in these streams shall be considered to be the stream's edge.

4. The following portions of streams typically lack a defined water's edge, and Subparagraph 3. shall not apply:

   a. Mills Creek upstream of the intersection of the creek with the Fort Christmas Road in Section 2, Township 22 South, Range 32 East;

   b. Long Branch upstream of the intersections of the creek with SR 520;

   c. Hart Branch upstream of the intersection of the creek and the Old Railroad Grade in Section 18, Township 23 South, Range 32 East;

   d. Cowpen Branch upstream of the southernmost bifurcation of the creek in Section 20, Township 23 South, Range 32 East;

   e. Green Branch upstream of the intersection of the creek with the north-south section line between Section 29 and 30, Township 23 South, Range 32 East;

f. Turkey Creek including Turkey Creek Bay upstream of the intersection of the creek with the Weewahootee Road in Section 5, Township 24 South, Range 32 East;

g. Little Creek upstream of the intersection of the creek with the north-south section line between Sections 22 and 23, Township 24 South, Range 32 East;

h. Fourmile Creek including Bee Tree Swamp upstream of a point along the creek exactly halfway between section lines at the south end of Section 21 and the north end of Section 33 within Section 28, Township 24 South, Range 32 East; and

i. all of the Econlockhatchee River Swamp (a portion of the Econlockhatchee River).

(b) Any of the following activities within the Riparian Habitat Protection Zone are presumed to adversely affect the abundance, food sources, or habitat of aquatic or wetland dependent species provided by the zone: construction of buildings, golf courses, impoundments, roads, canals, ditches, swales, and any land clearing which results in the creation of any system. (activities not listed above do

not receive a presumption of no adverse effect.)

(c) The presumption in paragraph (b) shall not apply to any activity which promotes a more endemic state, where the land in the zone has been changed by man. An example of such an activity would be construction undertaken to return lands managed for agriculture or silviculture to a vegetative community that is more compatible with endemic land cover.

(d) Applicant's seeking to develop within the Riparian Habitat Protection Zone shall be given the opportunity to demonstrate that the particular development for which permitting is being sought will not have an adverse effect on the functions provided by the zone to aquatic or wetland dependent species. The functions provided by the zone are dependent on many factors. When assessing the value of the zone to aquatic and wetland dependent species, factors which the District will consider include: vegetative land cover, hydrologic regime, topography, soils, and land uses, existing within and adjacent to the zone; and range, habitat, and food source needs of aquatic and wetland dependent species, as well as sightings, tracks, or other such empirical evidence of use.

(e) The standard of paragraph 11.4.4(a) may be met by demonstrating that the overall

merits of the proposed plan of development, including the preservation, creation or enhancement of viable wildlife habitat, provide a degree of resource protection to these types of fish and wildlife which offsets adverse effects that the system may have on the abundance, diversity, food sources, or habitat of aquatic or wetland dependent species provided by the zone. Mitigation plans will be considered on a case-by-case basis upon detailed site specific analyses. The goal of this analysis shall be the determination of the value of the proposed mitigation plan to aquatic and wetland dependent species with particular attention to threatened or endangered species. Mitigation plans should include: the information set forth in subsection 16.1.5 for the uplands and wetlands within the zone and within other areas to be preserved, created or enhanced as mitigation for impacts within the zone; as well as other pertinent information, including land use, and the proximity of the site to publicly owned land dedicated to conservation. Implementation of this section contemplates that the proximity of development to the river and tributaries named herein and activities permitted in the zone may vary from place to place in support of a functional resource protection plan. Furthermore, some reasonable use of the land within the

protection zone can be allowed under subsection 11.4.4.

(f) Roads or other traversing works which cross the zone have the potential to fragment the zone and adversely affect the habitat value of the zone to aquatic and wetland dependent species. To minimize adverse effects to the zone, applicants for permits to construct traversing works in the zone must first demonstrate the need for the traversing works to provide for regional transportation, regional utility services, or reasonable property access, in addition to meeting the requirement of paragraph 11.4.4(a), above. Traversing works must also be designed to meet all requirements of the district rules related to water quality and quantity. Permittees responsible for traversing works shall be required to be responsible for maintaining the traversing works clean and free from trash and debris to the greatest extent practical.

11.4.5 Off-site Land Preservation as Mitigation in the Econlockhatchee River Hydrologic Basin.

Mitigation in the Econlockhatchee River Hydrologic Basin must offset any adverse impacts of the system to the functions provided by the Econlockhatchee River Riparian Habitat Protection Zone and wetlands outside this zone, to aquatic and wetland dependent species. Subsection 16.1.6 of this Handbook allows for consideration of innovative

mitigation proposals. Mitigation within the Econlockhatchee River Hydrologic Basin may include the off-site preservation of lands. The lands proposed for preservation must be regionally significant or provide unique fish and wildlife habitat. For the purposes of this section the land to be preserved must be located entirely within the Econlockhatchee River Basin as designated in section 40C-41.023, F.A.C., and the applicant must propose to convey the land in fee simple to the St. Johns River Water Management District or a mutually acceptable designee. At the option of the District, a perpetual conservation easement or other acceptable legal instrument may be conveyed to the District or a mutually acceptable designee in accordance with section 704.06, F.S. All of the following requirements will apply to off-site land preservation proposals within the Econlockhatchee River Basin:

(a) Prior to proposing off-site land preservation, the applicant must demonstrate that alternatives for avoiding adverse impacts to the functions provided by the Riparian Habitat Protection Zone and wetlands outside the zone have been evaluated, and that to the maximum extent practicable, adverse impacts to these functions have been avoided.

(b) As a part of an off-site land preservation proposal, the applicant must demonstrate that the proposal meets the standard described in paragraph 11.4.4(a) by providing

a functional analysis, as described in paragraph 11.4.4(b), of the proposed impacts within the Riparian Habitat Protection Zone and the benefits of the proposed preservation area. If adverse impacts occur to wetlands, then as part of an off-site land preservation proposal, the applicant must demonstrate that the proposal meets the criteria described in subsection 10.7.4.

(c) The range of appropriate ratios to be used to determine credit for preservation will depend upon the functional analysis of impacts and benefits. The suitability of this mitigation option, the specific ratios applicable, credits to be assigned, and the use of these credits will be determined on a case-by-case basis based on site specific information.

11.5 Sensitive Karst Areas Basin

In addition to the requirements for issuance and design and performance criteria described in chapter 40C-42, F.A.C., systems in the Sensitive Karst Areas Basin must meet the criteria in section 40C-41.063(6), F.A.C.

* * *

Tequesta muck (64)
Terra Ceia muck (65)
Tomoka muck (66)
Turnbull muck (67)
Valkaria fine sand (72)

Wabasso fine sand, depressional (74)
Wauchula fine sand, depressional (76)

16.1.3 Mitigation

(a) Mitigation means "action or actions taken to offset the adverse impacts of a system on the functions wetlands provide to fish, wildlife, and threatened or endangered species. Mitigation can consist of wetland creation or wetland enhancement. Wetland creation means the construction of a functional wetland in what was an upland area. Wetland enhancement means the improvement of the ecological value of an existing wetland.

The ecological value of a wetland can sometimes be enhanced by altering its hydroperiod, increasing the hydrologic connection to off-site areas, by increasing the effective size of the wetland through the use of wildlife corridors, or by improving the habitat adjacent to or surrounding the wetland. Because the evaluation of wetland enhancement proposals is dependent upon site-specific factors, proposals will be considered on a case-by-case basis.

(b) Off-site Mitigation – Mitigation should take place on-site or in close proximity to the wetland loss. Situations may occur, however, where it is appropriate to perform mitigation activities off-site. In reviewing these proposals, the District

will consider the benefits and disadvantages to the regional ecology as opposed to the local on-site ecology.

(c) Functional Mitigation – Wetland creation or enhancement should restore the type of functions lost due to the wetland impact, i.e. water quality, fish habitat, wading bird habitat, etc. The simplest way to do this is through the creation or enhancement of the same type of wetland. There may be situations where it is appropriate to create or enhance a different type of wetland to improve the local or regional ecology. The District may consider such proposals when the applicant has clearly demonstrated the benefit to the local or regional ecology.

(d) Uplands

The preservation of upland habitat, adjacent to preserved or enhanced wetlands, may be considered as partial mitigation because of the value of these areas to the ecology of those aquatic and wetland dependent species which do not spend their entire life cycle in the wetland or aquatic habitat, e.g. frogs, toads, turtles, salamanders, wading birds, etc., and because of the buffering function of these areas.

(e) Lake Design

Lakes designed to provide additional habitat for fish and wildlife such as

those with expanded vegetated littoral zones, fluctuating water levels, island or other features, may be considered as partial or total mitigation, depending on the type and degree of wetland impact.

16.1.4 Wetland Creation

The following guidelines should be used to estimate the extent of wetland creation which may mitigate for the destruction of a unit of wetland which has a direct hydrologic connection to a stream, other watercourse, or impoundment or wetland not wholly owned. These guidelines are for preliminary planning purses only and the actual extent of wetland creation may be more or less depending on staff evaluation of site and regional conditions. The following ratios apply to wetland creation (not wetland enhancement) proposals.

(a) Mangrove swamps and hardwood swamps – The ratio of created wetland to lost wetland should be 2:1 to 5:1 depending on site-specific factors. If the wetland proposal depends extensively on natural recolonization the ratio may be higher.

(b) Saltwater marshes and freshwater marshes – The ratio of created wetland to lost wetland should be 1.5:1 to 2:1. If the wetland creation proposal depends extensively on natural recolonization the ratio may be 3:1 to 4:1.

The ratios for wetland creation are based, in part, upon the temporary loss of wetland habitat while the created wetland is in early succession. The ratios may be adjusted by providing assurance that the created wetland replaces the habitat functions of the wetland which is lost. This is most easily achieved by the creation of wetlands prior to wetland loss. The ratios may also be adjusted when wetland creation is combined with other mitigation proposals such as upland buffer areas adjacent to wetlands, conservation easements, wetland enhancement proposals or other alternative mitigation proposals. For wetlands which have only a man-made direct hydrologic connection to a stream, other watercourse, or impoundment or wetland not wholly owned where the connection has adversely altered the hydroperiod of the wetland, the ratios will be less than the guidelines stated above. For wetlands which do not have a direct hydrologic connection to a stream, other watercourse, or impoundment or wetland not wholly owned where the connection has adversely altered the hydroperiod of the wetland, the ratios will be less than the guidelines stated above. For wetlands which do not have a direct hydrologic connection to a stream, other watercourse, or impoundment or wetland not wholly owned, the ratios will also be less than the guidelines stated above. Mitigation or reclamation approved by other regulatory agencies will be considered and may be

acceptable, either entirely or in part, as mitigation by the District.

For lands and mining activities that fall under the jurisdiction of the Florida Department of Natural Resources pursuant to Section 378.601, Florida Statutes, mitigation or compensation plans that are consistent with the land reclamation policies and criteria approved by that agency will be considered by the District as satisfactory mitigation.

16.1.5 Mitigation Proposals

Mitigation proposals may be approved in concept with a Permit for Conceptual Approval. Detailed proposals must be submitted with individual or general permits and should include the following information concerning the wetland to be affected by the system:

(a) A description of the type and function of the Wetland being altered including area, vegetative community and hydrologic regime.

(b) A list of all species designated as endangered or threatened (pursuant to sections 39-27.003 or 39-27.004, F.A.C., or paragraph 581.185(5)(a), F.S.), which utilize the wetland.

(c) Topographic information and soils classification for the existing wetland.

(d) A description of the proposed system and its impact on the wetland, e.g., areal

extent of fill or excavation or change in hydroperiod or drainage practices.

Mitigation proposals must contain a description of the wetland community to be created or enhanced as a result of the mitigation activity, and must include descriptions of:

(a) Area and location

(b) Species to be planted

(c) Plant density

(d) Source of plants or mulch

(e) Proposed hydroperiod

(f) Effects on local and regional ecology and faunal diversity

(g) Monitoring and maintenance methods

Specific conditions will be included in permits involving mitigation to require monitoring for plant survival and growth. The length and complexity of monitoring will depend upon the type of mitigation approved. In general, periodic, brief reports will be required detailing a survival of planted species, the extent of invasion by non-target species, and the overall vigor of the community.

16.1.6 Mitigation Banks.

16.1.6.1 Intent.

The Environmental Reorganization Act of 1993 directs the District to adopt rules governing the creation and use of mitigation

banks to offset adverse impacts caused by activities regulated under Part IV of Chapter 373, F.S. This section, in addition to other rules promulgated under Part IV of Chapter 373, F. S., is intended to meet this requirement. The establishment and use of Mitigation Banks in or adjacent to areas of national, state, or regional ecological significance is encouraged, provided the area in which the Mitigation Bank is proposed to be located is determined appropriate for mitigation banking and the bank meets all applicable permitting criteria.

The District recognizes that, in certain instances, adverse impacts of activities regulated under Part IV of Chapter 373, F.S, can be offset through participation in a Mitigation Bank. This section provides criteria for this mitigation alternative to complement existing mitigation criteria and requirements. This section does not supersede any other criteria and requirements in rules promulgated under Part IV of Chapter 373, F.S.

The District intends that Regional Mitigation Banks be used to minimize mitigation uncertainty associated with traditional mitigation practices and provide greater assurance of mitigation success. It is anticipated that the consolidation of multiple mitigation projects into larger contiguous areas, will provide greater

* * *

transferred to must provide reasonable assurances that it can meet the requirements of sections 16.1.6.10 and 16.1.6.11. If the transfer to the District is proposed, the current banker shall provide an updated cost estimate and adjust the financial responsibility mechanism, as appropriate, prior to transfer of the permit.

(e) A Mitigation Bank Permit can be issued as a modification of a Mitigation Bank Conceptual Approval.

16.1.6.14 Department of Environmental Protection Mitigation Banks.

The Department of Environmental Protection ("Department") may construct, operate, manage, and maintain a Mitigation Bank pursuant to this section after obtaining a Mitigation Bank Permit from the District.

(a) The Department may apply to establish a Mitigation Bank by submitting a Mitigation Bank plan, meeting the applicable permitting criteria of this section, in one of the following formats:

1. A Mitigation Bank Plan identifying one or more parcels of lands to be acquired for mitigation site(s).

2. A Mitigation Bank plan identifying one or more parcels of land in which the Department has a legal or equitable interest.

(b) Land Use Restrictions on Department Mitigation Banks.

1. The Department shall maintain the land within the Regional Mitigation Bank pursuant to the terms of the Mitigation Bank Permit. Any change in the land use shall require a modification of the Mitigation Bank Permit.

2. Notwithstanding any other provision of this section, the Department may sell, transfer, or use Mitigation Credits prior to acquiring the proposed mitigation site as set forth in its Mitigation Bank Permit.

(c) Department Financial Responsibility. A portion of the funds contributed to a Department Mitigation Bank from the sale of credits shall be dedicated for the construction and implementation of the Mitigation Bank, and a portion of the funds shall be dedicated for the long-term management of the bank as set forth in the Mitigation Bank Permit. Funds derived from the sale of Mitigation Credits which are not necessary for the construction, implementation, and long-term management of a Department Mitigation Bank shall be dedicated for the initiation of other Department Mitigation Banks, or expansion other Department land acquisition or restoration projects

which improve regional ecological conditions.

(d) Procedures for Establishment of Mitigation Banks. Mitigation Banks established by the Department shall be permitted pursuant to the procedures in that certain First Amendment To August 28, 1992, Operating Agreement Concerning Management and Storage of Surface Waters Regulation, and Wetland Resource Regulation Between The St. Johns River Water Management District and Department of Environmental Regulation.

16.1.7 Mitigation Alternatives

Innovative mitigation proposals which deviate from the standards described in this handbook will be considered on a case-by-case basis.

The donation of money is not considered to be an acceptable method of mitigation unless the donation is used to purchase Mitigation Credits from a District Mitigation Bank pursuant to section 16.1.6, or the donation is specified for use in a previously identified District endorsed, environmental or restoration project, and the donation initiates the project or supplements an ongoing project. The project shall be sponsored by the District, and the adverse impacts of the surface water management system shall be offset by that previously identified project. The District may consider, in addition to those

instances addressed in Paragraph 16.1.3(d) or section 16.1.6.7, the donation or preservation of wetlands or uplands which are regionally significant or provide unique fish and wildlife habitat.

16.2 Formal Wetland Determination

Pursuant to section 373.421, F.S., the Governing Board

* * *

is available upon request from the St. Johns River Water Management District, Post Office Box 1429, Palatka, Florida 32178-1429. Permit applications for systems within the Wekiva River Protection Area shall be processed by the District staff pursuant to the time frames established in section 120.60, F.S., and any District rule regarding permit processing, except that any agency action to approve or approve with conditions shall not occur until the Local Government Notification has been received by the District.

(5) Within the Econlockhatchee River Hydrologic Basin the following standards and criteria are established:

(a) Design Storm Criteria. In order to demonstrate conformance with the harm to the resource criteria in paragraph 10.2.1(a), Applicant's Handbook: Management and Storage of Surface Waters, systems must meet the peak discharge requirement for the following 24 hour duration design storm events:

1. Mean annual storm (2.3 year return period).

2. 25-year return period. System outlet control structures can be designed to meet the control peak discharge rates for both design storms by use of a two-stage weir, v-notch weir, multiple orifices, or other similar structures.

(b) Floodplain Storage Criteria. In order to demonstrate conformance with the harm to the resource criteria in section 10.2.1(c), Applicant's Handbook: Management and Storage of Surface Waters, a system may not cause a net reduction in flood storage within the 100 year floodplain of the Econlockhatchee River or any of its tributaries, at a location with an upstream drainage area of 1 square mile or greater, except for structures elevated on pilings or traversing works that comply with conveyance requirements in subsection 10.5.2, Applicant's Handbook: Management and Storage of Surface Waters.

(c) Stormwater Management Standard. Construction of new stormwater management systems must be in accordance with the design and performance standards of chapter 40C-42, F.A.C. However, systems which serve drainage areas in excess of 10 acres cannot use detention with filtration treatment as the sole stormwater treatment methodology. Additionally, when retention systems are not feasible due to limited percolation capacity, wet detention treatment or other treatment demonstrated to be equivalent to retention or wet detention, in accordance with

chapter 40C-42, F.A.C., and paragraph 11.4.3(b), Applicant's Handbook: Management and Storage of Surface Waters, must be used.

(d) Riparian Wildlife Habitat Standard

1. The applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a system within the following designated Riparian Habitat Protection Zone will not adversely affect the abundance, diversity, food sources or habitat (including its use to satisfy nesting, breeding and resting needs) of aquatic or wetland dependent species:

a. The wetlands contiguous with the Econlockhatchee River and the following tributaries: Little Econlockhatchee River north of University Boulevard, Mills Creek, Silcox Branch (branch of Mills Creek), Mills Branch (branch of Mills Creek), Long Branch, Hart Branch, Cowpen Branch, Green Branch, Turkey Creek, Little Creek, and Fourmile Creek;

b. The uplands which are within 50 feet landward of the landward extent of the wetlands above; and

c. The uplands which are within 550 feet landward of the stream's edge as defined, for the purpose of this subsection, as the waterward extent of the forested wetlands abutting the Econlockhatchee River and the above named tributaries. In the absence of forested wetlands abutting these streams,

the stream's edge shall be defined, for the purpose of this subsection, as the mean annual surface water elevation of the stream; however, if hydrologic records are unavailable, the landward extent of the herbaceous emergent wetland vegetation growing in these streams shall be considered to be the stream's edge.

d. The following portions of streams typically lack a defined water's edge, and subparagraph c. shall not apply:

i. Mills Creek upstream of the intersection of the creek with the Fort Christmas Road in Section 2, Township 22 South, Range 32 East;

ii. Long Branch upstream of the intersections of the creek with SR 520;

iii. Hart Branch upstream of the intersection of the creek and the Old Railroad Grade in Section 18, Township 23 South, Range 32 East;

iv. Cowpen Branch upstream of the southernmost bifurcation of the creek in Section 20, Township 23 South, Range 32 East;

v. Green Branch upstream of the intersection of the creek with the north-south section line between Section 29 and 30, Township 23 South, Range 32 East;

vi. Turkey Creek including Turkey Creek Bay upstream of the intersection of the creek with the Weewahootee Road in Section 5, Township 24 South, Range 32 East;

vii. Little Creek upstream of the intersection of the creek with the north-south section line between Sections 22 and 23, Township 24 South, Range 32 East;

viii. Fourmile Creek including Bee Tree Swamp upstream of a point along the creek exactly halfway between section lines at the south end of Section 21 and the north end of Section 33 within Section 28, Township 24 South, Range 32 East; and

ix. all of the Econlockhatchee River Swamp (a portion of the Econlockhatchee River).

2. Any of the following activities within the Riparian Habitat Protection Zone are presumed to adversely affect the abundance, food sources, or habitat of aquatic or wetland dependent species provided by the zone: construction of buildings, golf courses, impoundments, roads, canals, ditches, swales, and any land clearing which results in the creation of any system. (activities not listed above do not receive a presumption of no adverse effect.)

3. The presumption in subparagraph 2. shall not apply to any activity which promotes a more endemic state, where the land in the zone has been changed by man. An example of such an activity would be construction undertaken to return lands managed for agriculture or silviculture to a vegetative community that is more compatible with the endemic land cover.

4. Applicants seeking to develop within the Riparian Habitat Protection Zone shall be given the opportunity to demonstrate that the particular development for which permitting is being sought will not have an adverse effect on the functions provided by the zone to aquatic or wetland dependent species. The functions provided by the zone are dependent on many factors. When assessing the value of the zone to aquatic and wetland dependent species, factors which the District will consider include: vegetative land cover, hydrologic regime, topography, soils, and land uses, existing within and adjacent to the zone; and range, habitat, and food source needs of aquatic and wetland dependent species, as well as sightings, tracks, or other such empirical evidence of use.

5. The standard of subparagraph 40C-41.063(5)(d)1., may be met by demonstrating that the overall merits of the proposed plan of development, including the preservation, creation or enhancement of viable wildlife habitat, provide a degree of resource protection to these types of fish and wildlife which offsets adverse effects that the system may have on the abundance, diversity, food sources, or habitat of aquatic or wetland dependent species provided by the zone. Mitigation plans will be considered on a case-by-case basis upon detailed site specific analyses. The goal of this analysis shall be the determination of the value of the proposed mitigation plan to aquatic and wetland dependent species with particular attention to threatened or endangered species. Mitigation plans should include: the information set

forth in subsection 16.1.5, Applicant's Handbook: Management and Storage of Surface Waters, for the uplands and wetlands within the zone and within other areas to be preserved, created or enhanced as mitigation for impacts within the zone; as well as other pertinent information, including land use, and the proximity of the site to publicly owned land dedicated to conservation. Implementation of this paragraph contemplates that the proximity of development to the river and tributaries named herein and activities permitted in the zone may vary from place to place in support of a functional resource protection plan. Furthermore, some reasonable use of the land within the protection zone can be allowed under paragraph 40C-41.063(5)(d).

6. Roads or other traversing works which cross the zone have the potential to fragment the zone and adversely affect the habitat value of the zone to aquatic and wetland dependent species. To minimize adverse effects to the zone, applicants for permits to construct traversing works in the zone must first demonstrate the need for the traversing works to provide for regional transportation, regional utility services, or reasonable property access, in addition to meeting the requirement of subparagraph 40C-41.063(5)(d)1., above. Traversing works must also be designed to meet all requirements of the district rules related to water quality and quantity. Permittees responsible for traversing works shall be required to be responsible for maintaining the traversing works

clean and free from trash and debris to the greatest extent practical.

(6) Within the Sensitive Karst Areas Basin, the following criteria are established:

(a) Stormwater management systems should be designed to assure adequate treatment (pursuant to section 17-28.700, F.A.C.) of the stormwater before it enters, the Floridan Aquifer, and to preclude the formation of solution pipe sinkholes in the stormwater system. Many different stormwater management system designs will achieve these goals, therefore the District does not require any specific system design. However, to assure protection of the Floridan Aquifer, the District does require certain design features. The individual site characteristics may affect what design features will be required. However, for all projects in sensitive karst areas, the following minimum design features are required:

1. A minimum of three feet of unconsolidated soil material between the surface of the limestone bedrock and the bottom and sides of the stormwater basin. Excavation and backfill of suitable material may be made to meet this criteria;

2. Stormwater basin depth should be as shallow as possible with a horizontal bottom (no deep spots);

3. Maximum stormwater basin depth of 10 feet; and

4. Fully vegetated basin side slopes and bottoms. The District recommends that Saint Augustine or Bermuda grass be used for this purpose.

5. The above requirements represent the minimum requirements for stormwater management system design in sensitive karst areas. However, depending on the potential for contamination to the Floridan Aquifer, more stringent requirements may apply for certain projects (e.g., industrial and some commercial sites). Examples for more stringent design features include:

a. More than three feet of material between the limestone bedrock surface and the bottom and sides of the stormwater basin,

b. Basin liners – clay or geotextile,

c. Sediment sumps at stormwater inlets,

d. Off-line treatment,

e. Special stormwater system design,

f. Ground water monitoring, and

g. Paint/solvent and water separators.

(b) Applicants for a stormwater management permit which do not propose to meet at least the minimum design features in paragraph (a) above, may seek approval for the alternative design through the District's individual permit process. However, the applicant must provide reasonable assurance that the

water quality standards of chapter 17-302, F.A.C., and the requirements of Chapter 17-28.700 are met.

Specific Authority 373.044, 373.113, 373.171, 373.415 FS. Law Implemented 373.413, 373.415, 373.416, 373.426 FS. History – New 12-7-83, Amended 5-17-87, 8-30-88, 8-1-89, 4-3-91, 9-25-91, 7-14-92.

Ex. 128

MANAGEMENT AND STORAGE OF SURFACE WATER TECHNICAL STAFF REPORT
May 9, 1994

APPLICANT: Coy Koontz
120 Ensenada Drive
Orlando, Florida 32825

AGENT: The Civil Design Group, Inc.
Attn: William Fogle, P.E.
401 South Rosalind Avenue, Suite 200
Orlando, Florida 32801

COUNTY: Orange
SECTIONS: 23
PROJECT NAME: Coy A. Koontz
TOWNSHIP: 22South
RANGE: 31East
ACRES OWNED: 14.9
PROJECT ACREAGE: 14.9

AUTHORITY: Rules 40C-4.041(1), (2)(b)10; 40C-42.061, F.A.C.

GENERAL DESCRIPTION OF APPLICATION NO. 4-095-0474A:

This application is for the construction of a surface water management system consisting of the clearing and filling of 3.4 acres of wetlands and 0.3 acre of uplands and the construction of a dry-bottom retention/detention basin with a side-bank filterdrain within a portion of the 3.7 acres of fill, all to serve an unspecified proposed commercial development.

RECEIVING WATER BODY(ies): A tributary (Class III) of the Econlockhatchee River (Class III/OFW)

EXISTING LAND USE: Forested and herbaceous uplands and wetlands

OPERATION AND MAINTENANCE ENTITY: Owner

STAFF COMMENTS:

Project Site

The proposed Coy A. Koontz project site is located south of S.R. 50 (Colonial Drive), just east of the Eastern Extension of the East-West Expressway, in eastern Orange County. The project is located within the Econlockhatchee River Hydrologic Basin, and is located almost entirely within the Riparian Habitat Protection Zone ("RHPZ"). Rule 40C-41.063(5)(d)1, F.A.C.

Wildlife Habitat

The 14.9 acre project site contains approximately 1.7 acres of uplands outside of the RHPZ and approximately 13.2 acres of uplands and wetlands within the RHPZ. The RHPZ on this site contains several different vegetative communities. The upland component (1.4 acres) of the RHPZ is predominantly longleaf pine with saw palmetto understory. A small portion of this upland (0.5 acre) is maintained as a grass right-of-way for the existing paved access road.

The wetland component of the RHPZ includes a tributary to the Econlockhatchee River. The on-site wetland consists of a diverse mixture of vegetative communities: 10.9 acres of mature, forested wetlands, and 0.9 acre of herbaceous wetlands. The higher elevations of the wetland consist of a seepage slope area, vegetated with pond pine and loblolly bay trees. There is a groundcover of dense saw palmetto. As the wetland elevation decreases, there is an herbaceous

area. The herbaceous portion of the wetland is located in an existing powerline easement. Historically, the area under the powerline easement was deforested and has been maintained as such by the power company. The vegetative community within the power line easement includes red root, rush fuirena, guinea grass, saw grass and red top panicum. The lowest elevation of the wetland is a mixed hardwood system with a mature canopy of loblolly bay, red maple, southern magnolia, laurel oak, water oak, and dahoon holly.

Collectively, these different vegetative communities in the RHPZ provide a diversity of habitat and food, sources, and serve as an important refuge for a variety of aquatic or wetland dependent wildlife species within this area of the Econlockhatchee River Hydrologic Basin. The resting, breeding, foraging, and nesting requirements of many aquatic or wetland dependent species, as well as other wildlife, are provided by the wetlands.

A total of 3.7 acres of RHPZ (0.3 acre of uplands and 3.4 acres of wetlands), consisting of the entire seepage zone and herbaceous wetland area, a narrow strip of the mixed hardwood zone, and a portion of the longleaf pine flatwoods, are proposed to be filled for the construction of a commercial development site and a surface water management system.

The Management and Storage of Surface Water ("MSSW") rules require an applicant to provide reasonable assurance that wetland functions to fish and

wildlife will not be adversely affected. Section 10.7.4 of the Applicant's Handbook, Management and Storage of Surface Waters, Rule 40C-4.301(2)(a)7, F.A.C. Additionally, the Econlockhatchee River Hydrologic Basin provisions require that an applicant provide reasonable assurance that the construction or operation of the system will not adversely affect the abundance, diversity, food sources, or habitat of aquatic or wetland dependent species. Rule 40C-41.063(5)(d), F.A.C. Construction of the proposed project, without mitigation, will displace natural wildlife habitat and cause adverse effects to fish and other wildlife species, including aquatic or wetland dependent species, and consequently, will not meet the referenced rules requirements.

The Governing Board Policy approved on September 8, 1993, requires the applicant to provide reasonable assurance that the proposed system will not result in cumulative unacceptable impacts upon water quality or wetland functions within the same drainage basin as the project. Property with similar configuration characteristics, as well as similar or shared wetland systems, occur within the same drainage basin as the proposed project. Without mitigation the applicant has failed to provide reasonable assurance that the activity under review, when considered with activities regulated under Part IV of Chapter 373, Florida Statutes, which may reasonably be expected to be located within wetlands and are located within the same drainage basin and which have adverse impacts like those which will be caused by the proposed project

will not result in a cumulative unacceptable impact upon wetland functions.

Mitigation for the Loss of Habitat

To offset the proposed loss of functions currently provided by the 3.7 acres of RHPZ to wildlife, the applicant has proposed, as mitigation, to place the remaining undeveloped 9.2 acres of RHPZ and the 1.2 acres of uplands adjacent to the RHPZ into a conservation easement.

Staff evaluated the proposed mitigation plan to determine if the proposal will provide the required reasonable assurances. Staff indicated to the applicant that a reduction of the wetland encroachments would reduce the amount of mitigation that would be needed. However, the applicant was unwilling to make revisions to reduce the wetland impacts.

Based on the high quality of the wetlands and uplands, and the functions they provide to aquatic or wetland dependant species, and the impacts proposed to these areas, the proposed on-site mitigation is insufficient to provide reasonable assurance that these functions will not be adversely impacted. The applicant's mitigation plan fails to offset the loss of habitat that would be caused by the project.

To reduce the proposed area of wetland impact, staff suggested an alternative to the proposed filling of part of the site for the construction of a dry-bottom retention/detention pond. The alternative would

employ a subsurface stormwater management system constructed under a portion of the project site. Staff also suggested reducing wetland impacts through elimination of the proposed fill in the side-slope areas and replacing these with stem walls. The applicant was unwilling to make any revisions to reduce the impact of the project sufficiently to make it permittable. Staff also suggested several off-site alternatives to on-site mitigation, including restoration, enhancement, and preservation. However, the applicant was unwilling to consider any additional mitigation options other than what was originally proposed.

Nevertheless, off-site mitigation enhancement options are available within the Econlockhatchee River drainage basin. For example, within the Hal Scott Preserve there are existing road systems in the wetlands that require the replacement of approximately 15 inoperative or abandoned culverts. Replacement of the culverts would enhance the wetland functions to wildlife in the Preserve by maintaining the hydrologic capabilities of the wetland system as well as eliminate any existing or potential sedimentation problems. Additionally, there are several ditches constructed in uplands within the Preserve that hydrologically and vegetatively connect isolated wetlands to the Econlockhatchee River. These ditches have altered the natural hydroperiod of the wetlands. Plugging or eliminating the ditch system would help rehydrate all or some of the affected wetland systems.

Another off-site mitigation enhancement option is available on the Demetree property. On this property

there is a series of ranch ditches in the uplands that connect several wetlands together. The ditch system discharges directly into the Econlockhatchee River. This ditch system has altered the natural hydroperiod of the wetland systems. Plugging or eliminating the ditch systems would aid in rehydrating all or some of the affected wetland systems, and therefore enhance the wetland functions to wildlife. Implementation of one or more of these off-site mitigation alternatives could offset the proposed impacts on the project site and make the project, as proposed, permittable.

If the applicant supplemented its on-site mitigation plan with an off-site enhancement mitigation option which included a total of at least 50 acres of wetland enhancement on either of the two referenced example sites, such an approach would sufficiently mitigate for the impacts proposed in this application. A combination of enhancement activities on both of these example sites, totalling 50 acres of wetland enhancement would also be acceptable. Equivalent off-site enhancement options on other properties within the basin could also be developed.

As another option, the applicant's on-site mitigation proposal would be sufficient to mitigate for a commercial development of smaller size on this site (assuming the relevant water quality and quantity were met). Specifically, the applicant could develop 0.7 of an acre of wetlands and 0.3 acre of uplands within the RHPZ for commercial development fronting S.R. 50 with mitigation for the wetland and

upland impacts in the form of a conservation easement or deed restriction consistent with Section 704.06, Florida Statutes, over the remaining undeveloped wetlands and uplands (this excludes the 0.4 acre portion of paved road within the RHPZ and the 0.5 acre portion of right-of-way) on the project site.

Water Quality and Quantity

The applicant has demonstrated that the proposed dry-bottom retention/detention basin with filtration conforms to the requirements of Chapters 40C-42, 40C-4, and 40C-41, F.A.C. The proposed fill area is not located within the 100-year floodplain; therefore, the floodplain storage criteria in Rule 40C-41.063(5)(b), F.A.C., is met. The other relevant water quantity standards and criteria in Chapters 40C-4 and 40C-41, F.A.C., have been adequately addressed.

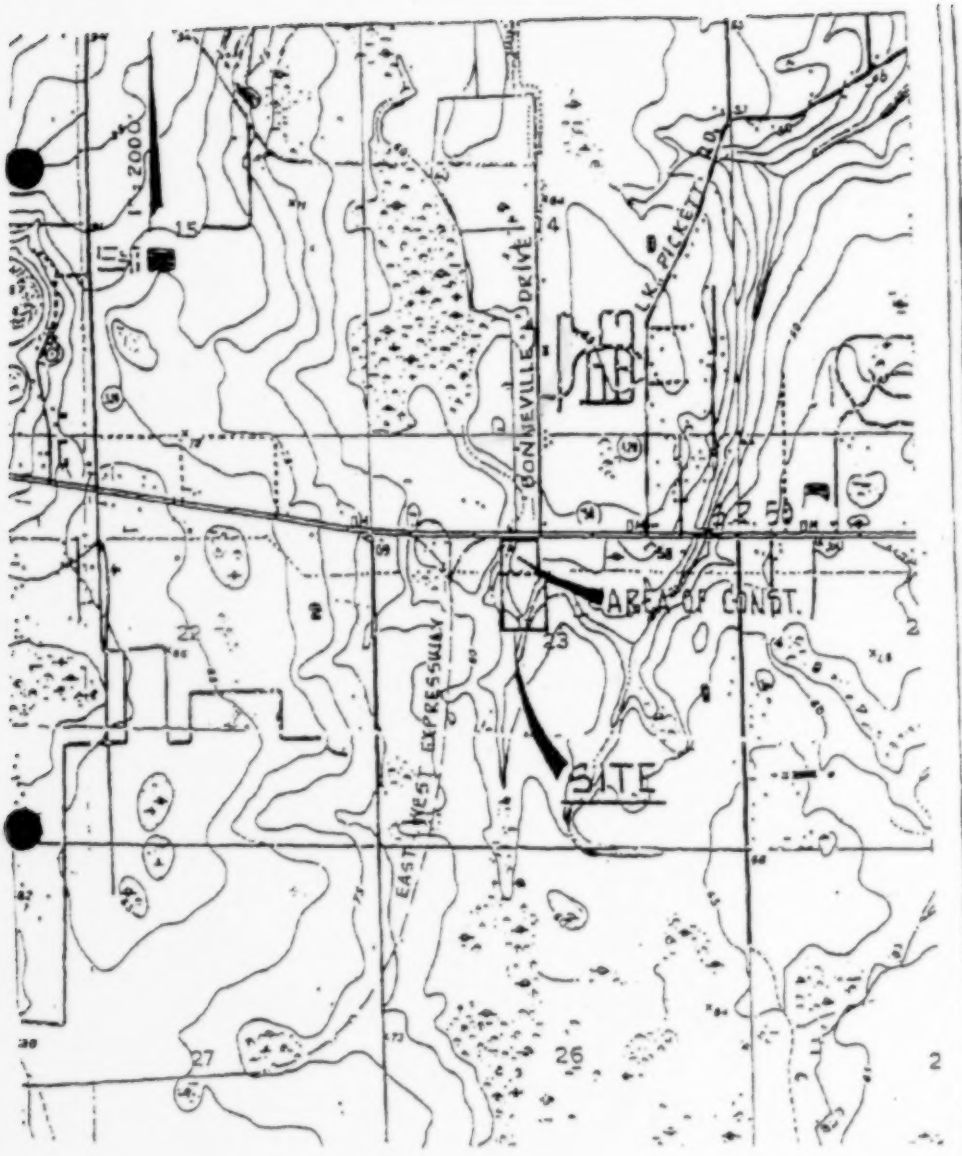
Recommendation

The applicant has not provided reasonable assurance that the construction of the proposed system will not adversely impact the habitat, abundance and diversity, and food source functions provided by wetlands to fish and wildlife. Likewise, the applicant has not provided reasonable assurance that the proposed construction will not adversely affect the abundance, food sources, or habitat (including its use to satisfy nesting, breeding and resting needs) of aquatic or wetland dependent species within the designated RHPZ. Furthermore, the applicant has not provided

reasonable assurances that the system will not cause cumulative unacceptable impacts on wetland functions within the same drainage basin. As presently proposed the project fails to meet the requirements of Rules 40C-4.301(2)(a)7, 40C-41.063(5)(d), F.A.C., and the Governing Board Policy approved September 8, 1993.

RECOMMENDATION: DENIAL

BRABHAM/JOHNSON



U.S.G.S.
OVIEDO S.W. QUADRANGLE

THE CIVIL DESIGN GROUP INC.
ENGINEERS · SURVEYORS · PLANNERS
ORLANDO, FLORIDA

LOCATION MAP

COY A. KOONTZ
PROPERTY

ORANGE COUNTY, FLORIDA

FIGURE 1

Attachment A
095-0474A IZ-095-0109A

Ex. 138

MEMORANDUM

DATE: May 15, 1991

TO: Jeff Elledge,
Director, Department of
Resource Management

Glenn Lowe,
Chief Environmental Specialist,
Department of Resource Management

THROUGH: Wayne Flowers, [/s/ WF]
Office of General Counsel

FROM: Clare E. Gray, Asst. General Counsel
[/s/ CG]
Office of General Counsel

SUBJECT: Conservation Easements/
Deed Restrictions
Mitigation/Resource Protection

Due to an apparent need to address protection of mitigation or conservation areas and an uncertainty regarding which legal instrument is most appropriate to protect them, we held a meeting to begin some legal policy clarification and direction on this issue. There had been questions from staff regarding which instrument was the most effective, which to use under various circumstances, and when should we get them for review. Another issue that came up was whether we could use a conservation easement to protect wetlands which were neither proposed to be affected by the project nor being used as mitigation for other impacts.

The purpose of our meeting and this memo is to put these issues to rest. In a nutshell, we believe the following should apply:

1. For residential subdivisions or commercial (e.g. office park complexes) developments in which the owner proposes to sell off lots within the project, we will request deed restrictions to protect wetland mitigation areas (including creation, enhancement, restoration or preservation areas). This is regardless of whether the area to be protected is separate from individual platted lots or whether the lots extend into the area.

To implement this, we will be substantially revising the deed restriction language so that it will accomplish essentially the same thing as our current deed of conservation easement. The permit condition will have to be revised [illegible] regard to timing of submittals. We will begin requiring that the draft document protecting the wetland mitigation area be submitted prior to permit issuance along with the maintenance documents.

2. For other projects where ownership will not be divided up or for which no covenants and restrictions are required, we will continue to require deeds of conservation easement. The timing of submittals under both paragraphs 1 & 2 will be changed so that we receive drafts documents prior to permit issuance.

3. We cannot require a permit applicant to give a conservation easement or deed restriction over

jurisdictional wetlands pursuant to Section 704.06, F.S., if construction of the permitted system will cause no impacts to those wetlands and preservation is not required, as part of mitigation or all mitigation issues have been otherwise resolved. This is so even if the lots are platted or proposed to extend into on-site wetlands. OGC does not believe that our statutory authority to protect water resources of the District from harm can be extended that far. We can, however require placement of both a deed restriction and permit condition (as appropriate) to require the Permit to be modified prior to any work being initiated in on-site wetlands by any person (e.g. subsequent lot purchasers).

4. For determining appropriateness or completeness of mitigation, an applicant doesn't get more "credit" for placing a conservation easement over areas rather than a deed restriction. As part of the mitigation requirement to provide reasonable assurance that the mitigation area will survive and replace the functions lost (as appropriate) we also require an affirmative declaration (by easement or restriction) that no activity inconsistent with the purpose of mitigation will occur within the mitigation areas.

We will be making some changes in the proposed language for deed restrictions, some very minor changes in the conservation easement, as well as making modifications to existing permit conditions and adding conditions to implement these clarifications. We will be putting together some materials to be placed in the Applicant's Handbook as an appendix.

Please give us some input/feedback on this. We believe that from a legal perspective, this is the best way to proceed. If you want to have a meeting to discuss this, please call Clare Gray to coordinate it.

WEF/mh

Ex. 142

MEMORANDUM

DATE: August 23, 1989

TO: Environmental Specialist Staff
Department of Resource Management

THROUGH: Jeff Elledge, Director [/s/ JE]
Department of Resource Management

Naomi S. Whitney, Assistant Director
[/s/ JE for]
Department of Resource Management

FROM: Glenn Lowe, Chief [/s/ GL]
Environmental Specialist
Department of Resource Management

RE: Mitigation Ratios

This topic was discussed at a recent meeting with Jeff Elledge, Jacksonville Environmental Specialists, and myself. Mitigation ratios for wetland creation should follow the guidelines presented in 16.1.4. Mitigation ratios should normally be 3:1 for forested wetlands and 2:1 for herbaceous wetlands, unless the wetlands being impacted are of particularly high or low resource value. For example, the loss of two acres of a hardwood swamp for a road crossing should be offset by creating six acres of hardwood swamp (3:1 ratio). For isolated wetlands, starting mitigation ratios should be 2:1 forested and 1:1 herbaceous.

Ratios for creation may be reduced by other forms of mitigation discussed in 16.1.3 and 16.1.6, A.H. Except for mitigation for isolated wetlands, ratios should not be reduced lower than the minimum presented in 16.1.4. For example, in the road through

the swamp scenario, an alternative to creating six acres of new swamp may be creating four acres of wetland (2:1 ratio), and preserving by conservation easement twenty acres of uplands and sixty acres of wetland.

The value (appropriate ratios, credit given, etc.) of the alternate forms of mitigation is still case by case as stated in the Applicant's Handbook. For rough guidelines, however, follow the attached July 19, 1989 memo from Jeff Elledge. Basically, these values should be assessed by using wetland creation as a standard to judge the offered alternatives. For example, question yourself whether the site in post development is better off with six acres of new wetlands or with four acres of new wetlands plus twenty acres of uplands that would otherwise be subject to development.

These are still rough guidelines, exceptions can be made but these should be discussed with senior staff members early in the review process. Also, keep in mind that these guidelines apply only to MSSW. It is important to note that Section 16.1.4 is in many situations, not as relevant as it was prior to the District's acceptance of DER Wetland Resource Permitting delegation authority. Mitigation for Wetland Resource Permit Applications should follow DER mitigation guidelines. When both permits are needed for the same work (impacts to waters of the state), both rule criteria must be met, however, the DER

guidelines will usually dictate the course of action for the MSSW permit.

GL:vwc

Attachment

cc: Legal
Hal Wilkening
Pat Frost
John Juilianna
Larry Gerry
Dannise Kemp
Randy Armstrong

MEMORANDUM

DATE: July 19, 1989

TO: Governing Board

THROUGH: Henry Dean [/s/ HD]
Executive Director

John R. Wehle [/s/ JW]
Assistant Executive Director

FROM: Jeff Elledge, Director [/s/ JE]
Department of Resource Management

RE: Wetland Mitigation

What follows is a brief description of the evolution of our mitigation policies and a verbatim copy of the Applicant's Handbook sections dealing with mitigation. Comments elaborating on the way the words have been implemented follow the Handbook language.

History

The District has been regulating development in wetlands since December of 1983, when the Management and Storage of Surface waters (MSSW) rule was revised and adopted District-wide. The focus of our wetland policy has been the protection of the benefits provided to off-site aquatic or wetland dependent species, water quality and water quantity. Mitigation is allowed under the rule as an alternative to the avoidance of wetland impacts; the basic goal is to offset adverse impacts to the point where no net adverse impacts are anticpated.

The earliest wetland mitigation efforts consisted of excavating an upland area (often at a 1:1 ratio) to a level that caused the ground water table to occur at or above the excavated land surface for a portion of each year. The applicant was then required to plant wetland vegetation in the "created wetland" to provide habitat for fish and/or other aquatic or wetland dependent wildlife. Little monitoring for the success of these wetland creation efforts was required on the part of the applicant in the early permitting program. Recent staff investigations indicate that many of the early mitigation projects failed, in that the planted vegetation did not survive.

In 1986, in response to requirements of the Legislature through an amendment to 373, F.S., the District changed the MSSW rule to include criteria for assessing impacts to isolated wetlands and included specific criteria and guidelines for wetland mitigation.

These changes made our regulatory program more complex because the mitigation language in the Applicant's Handbook opened the door to a variety of new types of mitigation.

Applicant's Handbook

16.1.3 Mitigation

(a) Mitigation is defined here as "action or actions taken to offset the adverse effects of system on off-site functions and in the case of threatened or endangered species, to offset

the adverse effects of a system on on-site and off-site functions." Mitigation can consist of wetland creation or wetland enhancement. Wetland creation means the construction of a functional wetland in what was an upland area. Wetland enhancement means the improvement of the ecological value of an existing wetland.

The ecological value of a wetland can sometimes be enhanced by altering its hydroperiod, increasing the hydrologic connection to off-site areas, by increasing the effective size of the wetland through the use of wildlife corridors, or by improving the habitat adjacent to or surrounding the wetland. Because the evaluation of wetland enhancement proposals is dependent upon site-specific factors, proposals will be considered on a case-by-case basis.

(b) Off-site Mitigation – Mitigation should take place on-site or in close proximity to the wetland loss. Situations may occur, however, where it is appropriate to perform mitigation activities off-site. In reviewing these proposals, the District will consider the benefits and disadvantages to the regional ecology as opposed to the local on-site ecology.

(c) Functional Mitigation – Wetland creation or enhancement should restore the type of functions lost due to the wetland impact, i.e. water quality, fish habitat, wading bird habitat, etc. The simplest way to do this is through the creation or enhancement of the same

type of wetland. There may be situations where it is appropriate to create or enhance a different type of wetland to improve the local or regional ecology. The District may consider such proposals when the applicant has clearly demonstrated the benefit to the local or regional ecology.

(d) Uplands – The preservation of upland habitat, adjacent to preserved or enhanced wetlands, may be considered as partial mitigation because of the value of these areas to the ecology of those aquatic and wetland dependent species which do not spend their entire life cycle in the wetland or aquatic habitat, e.g. frogs, toads, turtles, salamanders, wading birds, etc., and because of the buffering function of these areas.

(e) Lake Design

Lakes designed to provide additional habitat for fish and wildlife such as those with expanded vegetated littoral zones, fluctuating water levels, island or other features, may be considered as partial or total mitigation, depending on the type and degree of wetland impact.

16.1.4 Wetland Creation

The following guidelines should be used to estimate the extent of wetland creation which may mitigate for the destruction of a unit of wetland which has a direct hydrologic connection to a stream, other watercourse, or

impoundment or wetland not wholly owned. These guidelines are for preliminary planning purposes only and the actual extent of wetland creation may be more or less depending on staff evaluation of site and regional conditions. The following ratios apply to wetland creation (not wetland enhancement) proposals.

(a) Mangrove swamps and hardwood swamps – The ratio of created wetland to lost wetland should be 2:1 to 5:1 depending on site-specific factors. If the wetland proposals depends extensively on natural recolonization the ratio may be higher.

(b) Saltwater marshes and freshwater marshes – The ratio of created wetland to lost wetland should be 1.5:1 to 2:1. If the wetland creation proposals depends extensively on natural recolonization the ratio may be 3:1 to 4:1.

The ratios for wetland creation are based, in part, upon the temporary loss of wetland habitat while the created wetland is in early succession. The ratios may be adjusted by providing assurance that the created wetland replaces the habitat functions of the wetland which is lost. This is most easily achieved by the creation of wetlands prior to wetland loss. The ratios may also be adjusted when wetland creation is combined with other mitigation proposals such as upland buffer areas adjacent to wetlands, conservation easements, wetland enhancement proposals

or other alternative mitigation proposals. For wetlands which have only a man-made direct hydrologic connection to a stream, other watercourse, or impoundment or wetland not wholly owned where the connection has adversely altered the hydroperiod of the wetland, the ratios will be less than the guidelines stated above. For wetlands which do not have a direct hydrologic connection to a stream, other watercourse, or impoundment or wetland not wholly owned, the ratios will also be less than the guidelines stated above. Mitigation or reclamation approved by other regulatory agencies will be considered and may be acceptable, either entirely or in part, as mitigation by the District.

For lands and mining activities that fall under the jurisdiction of the Florida Department of Natural Resources pursuant to Section 373.601, *Florida Statutes,* mitigation or compensation plans that are consistent with the land reclamation policies and criteria approved by that agency will be considered by the District as satisfactory mitigation.

16.1.5 Mitigation Proposals

Mitigation proposals may be approved in concept with a Permit for Conceptual Approval. Detailed proposals must be submitted with individual or general permits and should include the following information concerning the wetland to be affected by the system:

(a) A description of the type and function of the wetland being altered including area, vegetative community and hydrologic regime.

(b) A list of all aquatic or wetland dependent-species designated as endangered or threatened (pursuant to. Sections 39-27.003 and 39-27.004, F.A.C.), which utilize the wetland.

(c) Topographic information and soils classification for the existing wetland.

(d) A description of the proposed system and its impact on the wetland, e.g., areal extent of fill or excavation or change in hydroperiod or drainage practices.

Mitigation proposals must contain a description or the wetland community to be created or enhanced as a result of the mitigation activity, and must include descriptions of:

(a) Area and location

(b) Species to be planted

(c) Plant density

(d) Source of plants or mulch

(e) Proposed hydroperiod

(f) Effects on local and regional ecology and faunal diversity

(g) Monitoring and maintenance methods

Specific conditions will be included in permits involving mitigation to require monitoring for plant survival and growth. The length and complexity of monitoring will depend upon the type of mitigation approved. In general, periodic, brief reports will be required detailing a survival of planted species, the extent of invasion by non-target species, and the overall vigor of the community.

16.1.6 Mitigation Alternatives

Innovative mitigation proposals which deviate from the standards described in this handbook will be considered on a case-by-case basis.

The donation of money is not considered to be an acceptable method of mitigation. In unusual circumstances, the District may consider, in addition to those instances addressed in Paragraph 16.1.3(d), the donation or preservation of wetlands or uplands which are regionally significant or provide unique fish and wildlife habitat.

Comments

1. Section 16.1.4(a) and (b) describe *ratios* for mitigating wetland losses for contiguous wetlands, both forested and herbaceous. For isolated wetlands, wetland enhancement, upland preservation, and off-site mitigation the Handbook offers no ratios.

2. *Upland Buffers (Section 16.1.3(d).* Upland buffers have been proposed more frequently over the last year and staff has given the most mitigation "credit" to those proposals which provide significant buffers (50-100) adjacent to the wetland areas preserved on the project site. At this point, staff has considered the upland buffers as a positive feature of the design which causes the wetland creation ratios to be lowered. In some cases, staff has lowered the creation ratios to below the minimum due to the inclusion of buffers in the mitigation plan. This is dependent on the ecological value of the buffers and of the wetland to be impacted.

Pros of Upland Preservation:

1) They help maintain the overall functional integrity of wetland systems, 2) relative to wetland creation they are 'less trouble,' wetland creation is an imperfect science, it is costly both for the applicant and the District in terms of commitment to success (the chances of the District dealing with compliance problems with a permit that involves wetland creation for mitigation is high relative to other aspects of the permitted plan).

Cons of Upland Preservation:

The general values of uplands to wetlands are well recognized, however it is difficult to *quantify* these values – it is much easier to say the loss of 5 acres of wetlands is offset by the creation of another similar wetland of the same size (or larger).

The values of upland preservation is also very variable – depending upon the type and condition of both the affected wetlands and uplands and upon the post-development land use.

3. *Wetland/Upland Preservation:* Section 16.1.6 states that in unusual circumstances, the District may consider the donation or preservation of wetlands or uplands which are regionally significant or provide unique fish and wildlife habitat as mitigation off-setting the loss of wetland habitat. In considering mitigation proposals under 16.1.6, staff rely upon the attached memo from Jeff Elledge, Director, Department of Resource Management, which outlines Board approved policy and the attached memo from Dale Twachtmann, Secretary, Department of Environmental Regulation, which discusses DER's policy regarding this issue. Staff considers that the ratios should be high (10:1 to 100:1) and the preserved areas should indeed be special as indicated above.

4. *Mitigation (wetland creation) in on-site lakes* has been approved in many instances. As assessment of success and problems with creation in lakes and ponds is ongoing. Generally, credit for this form of mitigation is reserved to 1) mitigation of impacts to low value, i.e. drained wetlands, 2) in concert with other forms of mitigation to lower the ratios for the standard in-kind wetland creation. For example, the removal of 3 acres of forested wetlands may require a 5:1 wetland creation:wetland lost ration. If the applicant is proposing extensive lake creation, District staff may consider the creation of expanded littoral zones in these lakes as a positive element of the plan

and, in accordance with 16.1.3(e), justification for reducing the need of creating 15 acres of forested wetlands contiguous with the affected system to 6 acres which would represent the minimum 2:1 ratio mentioned in 16.1.4. This same approach holds true with mitigation plans involving the preservation by conservation easement of upland buffers and on-site wetlands not proposed for development.

5. *Deed Restrictions and Conservation Easements*

Deed Restrictions: Although not described in the Handbook, the District has required the placement of a deed restriction over project wetlands when it appears those wetlands would likely be subject to impacts beyond those addressed in the permitted plan, due to design of the project, e.g., buyers often purchase lots which extend into wetland areas and without a conservation easement the new owners might unknowingly clear and fill the wetland on their lots. This additional unpermitted impact can result in new owners being cited for violations and penalties. The District has received complaints from these owners, who want to know why they were not informed that they were purchasing property which required additional permitting. A Deed Restriction does not prevent a property owner from working in the wetland portion of his property but it does put the owner on notice that such work will require a District permit (modification of original permit). The use of conservation easements can result in a lowering of mitigation ratios down to the minimum allowed by the rule depending on the area

being preserved and the impacts of the permitted activity.

Conservation Easements: When the District accepts the preservation of land, either wetlands or uplands, as mitigation under either section 16.1.3(d) or 16.1.6 the District has required that these lands be put in a conservation easement (or, as an alternative and under appropriate circumstances, donated to the District.) "Preservation" without these mechanisms provides no additional protection over that afforded by the existing regulations (i.e. the need to modify the permit if work in wetlands is proposed at a later date).

6. *Isolated wetlands* often provide different ecological benefits to aquatic or wetland dependent species because of their isolation. For example, the absence of large predatory fish allows certain species of amphibians to breed successfully in isolated wetlands but not in contiguous wetlands. The Applicants Handbook calls for lower ratios (1:1 to 2:1) for the destruction of isolated wetlands. Staff typically seeks lower ratios for isolated wetland loss, but in rare instances the ratios may be higher when extraordinary isolated wetlands are involved.

7. To date, the District has largely taken a case by case approach to mitigation. Applicants are able to mix various kinds of mitigation (i.e. creation, enhancement and preservation) to achieve the most favorable environmental results. The rule provides general guidelines for mitigation ratios, but provides considerable flexibility to the District to determine whether

a specific mitigation plan is adequate. This approach is often an open invitation to criticism that the District is inconsistent in its application of the rule. To ensure a uniform evaluation of permit applications, the Lead Environmental Specialists, Chief Environmental Specialist, Directors and Staff Attorneys, oversee the review of applications and review the Technical Staff Reports for final approval.

Recommendation

The above is an overview of wetland mitigation as currently implemented. If the Board wishes to make changes or provide further clarification for applicants and staff, it is recommended that they direct staff to formulate such changes for consideration through either the Policy Committee or the rule adoption process.

JE:GL:LG:vwc

cc: Heather Nixon
Larry Gerry
Lisa Grant

Ex. 158

MEMORANDUM

DATE: June 23, 1988

TO: All Environmental Specialists
Department of Resource Management

FROM: Jeff Elledge, Director [/s/ JE]
Department of Resource Management

SUBJECT: Donation of Preservation of Wetlands and Uplands as Mitigation

PURPOSE: **To establish guidelines for review of offers of wetland and upland donation or preservation as mitigation for wetland impacts regulated by the District under Part IV, Chapter 373, F.S.**

I. Introduction

The District's Management and Storage of Surface Waters rule (Chapter 40C-4, *F.A.C.*) requires that applicants provide reasonable assurance that their proposed activities will not adversely affect hydrologically related environmental functions. Section 10.7.4 of the MSSW Applicant's Handbook provides further guidance on how the District reviews proposed activities for compliance with this criterion. It is noted in Section 10.7.4, A.H., that mitigation may be proposed if an activity does not otherwise meet the wetland review criteria.

The District's mitigation rule is within Section 16.1.3, A.H. Mitigation normally consists of creation of wetlands or ecological enhancement of wetlands on-site, although there are provisions for off-site mitigation, preservation of upland

buffers and other kinds of mitigation that can be shown to benefit the local or regional ecology.

II. Donation or preservation of lands as mitigation.

The District will only accept donation or preservation of wetlands or uplands (except as described in 16.1.3(d), A.H.) as mitigation for the loss of wetlands when:

a. The wetlands or uplands to be preserved or donated are regionally significant, or

b. The wetlands or uplands to be preserved or donated provide unique fish and wildlife habitat; and

c. The resource benefits associated with the donation or preservation must offset the resource values lost due to the proposed system.

A. *When is a wetland or upland area regionally significant?*

A number of factors need to be considered when determining whether or not an area is of regional significance. In addition to the factors in 10.7.5, A.H., the following factors are relevant:

1. the presence of contiguous public or preserved lands

2. the land is within an area designated for environmental preservation or conservation in a regional or state acquisition or comprehensive plan

3. the environmental benefits of the donation are consistent with the District's objectives.

B. *When does a wetland or upland provide unique fish or wildlife habitat?*

An area provides a unique type of habitat whenever it is different than typical habitat types in the region. For example, large gopher tortoise communities are considered "unique" wildlife habitat. Gopher tortoises are Species of Special Concern. Their burrows often provide critical habitat for indigo snakes and gopher frogs which are also listed species and, unlike gopher tortoises, wetland dependent.

C. *What are the water resource benefits associated with the donation or preservation?*

The factors in 10.7.5, A.H. Can be used to weigh the water resource value gained versus the water resource value lost in any mitigation proposal. The District should also consider the likelihood of development activity being proposed for a parcel and whether the water resource value of a parcel would be adequately preserved if it were not donated. One possible benefit of a donation is that the lands that are donated to a public entity could become available for public use. Since the public usually does not have access to the wetlands being destroyed by the MSSW project, donation can have a public recreation and use benefit.

D. *Other considerations*

Once it has been determined that donation of land should be considered as acceptable mitigation, there are several ancillary considerations to be addressed. First, if less than full fee title is to be transferred, will the District gain sufficient property rights to insure adequate protection? Next, once the land is donated, can it be adequately managed by the District or through an agreement with another governmental entity? The District may also direct that the land be donated to a third party or agency if management consistent with District objectives is assured. Finally, prior to accepting title, the District should require the following:

1. a survey of the lands to be donated;

2. a commitment for title insurance; and

3. an affidavit stating that no hazardous or toxic materials or wastes are buried or stored on the property and an indemnification of the District or receiving agency by the applicant for any costs associated with assessment or cleanup of hazardous or toxic materials or wastes found on the subject property.

Whenever an applicant proposes the donation of real property to the District as mitigation, a staff committee consisting of representatives from the Legal Office, Chief Environmental Specialist and Office of Land Acquisition will evaluate the mitigation proposal. In addition

to the factors discussed above, the staff committee will review the management requirements of the parcel as well as the evidence of title which the applicant possesses. They will make a recommendation to the Executive Office on whether the proposal should be recommended to the Governing Board as part of a permit approval.

JE:1d

September 8, 1993

Policy for Consideration of Secondary and Cumulative Impacts in the Management and Storage of Surface Waters Program

Applicability

This policy will be applicable to the review of Management and Storage of Surface Waters ("MSSW") individual, general and conceptual approval permit applications required by or applied for pursuant to Rule 40C-4.041(2), F.A.C. It shall be applied to all final agency action taken after September 8, 1993, on any such application; however, activities which have a valid permit pursuant to Part IV, Chapter 373, F.S., and which are either exempt or have a valid permit pursuant to sections 403.91-403.929, F.S., on September 8, 1993, shall be exempt from the policy. This exemption shall be for the plans, term, and conditions approved in the permit issued under Part IV, Chapter 373, F.S., or in any permit issued under sections 403.91-403.929, F.S., and shall be valid for the term of such permits. Projects for which complete permit applications (i.e. individual, general and conceptual) have been received by the District within 60 days after the effective date of this policy shall be exempt from this policy.

Cumulative Impacts

In determining whether to grant or deny a conceptual approval, individual or general permit applied for or required pursuant to Rule 40C-4.041(2), F.A.C., the

District shall review cumulative impacts to water quality and to wetland functions (identified in subsection 10.7.4, MSSW Applicant's Handbook ("A.H.")) within the same drainage basin as the activity for which a permit is sought. The drainage basins within the District are identified on Exhibit 1.

This cumulative impact criterion will consist of two parts, one part addressing the relationship between the activity under review and certain past actions, the other addressing the relationship between the activity under review and certain future actions:

> 1. An applicant must provide reasonable assurance that the activity under review, when considered with:
>
> a) existing projects, and
>
> b) activities regulated under Part IV, Chapter 373, F.S., which are under construction,
>
> * * *
>
> chapter 373, F.S.", includes activities within the regulatory authority of the District under Part IV, chapter 373, F.S., whether or not the current District rules actually require permits for such activities.
>
> For the purpose of this policy, existing comprehensive plans, adopted pursuant to chapter 163, F.S., of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations will be considered in determining whether an activity is "reasonably to be expected".

Water quality impacts are considered unacceptable if state surface water quality standards will be exceeded.

Applicants may propose mitigation, as described in section 16, A.H., to offset unacceptable cumulative impacts to wetland functions.

Secondary Impacts

In determining whether to grant or deny a conceptual approval, individual or general permit applied for or required pursuant to Rule 40C-4.041(2), F.A.C., the District will consider secondary impacts to wetland functions (identified in subsection 10.7.4, A.H.), water quality, and upland habitat for aquatic and wetland dependent fish and wildlife listed as endangered, threatened or of special concern (hereafter referred to as "listed species"). Aquatic and wetland dependent fish and wildlife are an integral part of the water resources which the District is authorized to protect under Part IV of chapter 373, F.S. Those aquatic or wetland dependent species which are listed as threatened, endangered or of special concern are particularly in need of protection under this regulatory program. These listed species are identified in Exhibit 2.

This criterion will consist of three parts:

1. An applicant must provide reasonable assurance that the construction, operation, alteration, maintenance, removal or abandonment of a proposed system will not cause an unacceptable impact upon habitat functions that uplands within

the project area currently provide for listed species.

If reasonable scientific judgment indicates potential use of upland habitat on the proposed site by listed species, considering site characteristics and the range and habitat needs of such species, and the proposed system impacts this habitat:

* * *

a) additional phases or expansion of the proposed system for which plans have been submitted to the District or other governmental agencies; and

b) on-site and off-site activities regulated under Part IV, chapter 373, F.S. or activities described in section 403.813(2), F.S., that are very closely linked and causally related to the proposed system,

will not result in unacceptable impacts to wetland functions identified in subsection 10.7.4, A.H., and to water quality. As part of this review, the District will also consider the impacts of the intended or reasonably expected uses of the future activities on wetland functions and water quality.

In conducting the analysis under paragraph 3(b), the District will consider those future activities which would not occur but for the proposed system and where the proposed system would be considered a waste of resources, should the future activities not be permitted. See *del Campo v. State, Dept. of Environmental Regulation*, 452 So. 2d 1004 (Fla. 1st D.C.A. 1984),

Where feasible, proposed projects shall be designed in a fashion which does not necessitate future wetland impacts. If a proposed system will cause future adverse impacts to wetland functions, the applicant must provide reasonable assurances that those future adverse impacts to wetland functions can be successfully offset. To provide reasonable assurances that future adverse impacts to wetland functions can be successfully offset and that water quality standards will not be violated, the applicant must provide information sufficient to obtain a conceptual permit for those future impacts.

Project expansions and future project phases will be considered in the secondary impact analysis, and if the District determines that future phases of a project involve impacts that appear not to meet permitting criteria, the current application may be denied unless the applicant can provide reasonable assurance that those future phases can comply with permitting criteria. One way for applicants to establish that future phases or project expansions do not have unacceptable secondary impacts is for the applicant to obtain a conceptual permit for the entire project.

EXHIBIT 1

DRAINAGE BASINS

01 NASSAU RIVER
- 1A Nassau River

02 ST. MARYS RIVER
- 2A Upper St. Marys River
- 2B Middle St. Marys River
- 2C Lower St. Marys River

03 LOWER ST. JOHNS RIVER
- 3A Crescent Lake
- 3B Etonia Creek
- 3C Black Creek
- 3D Ortega River
- 3E Trout River
- 3F Deep Creek Unit
- 3G Sixmile Creek
- 3H Julington Creek
- 3I Intracoastal Waterway
- 3J South Lower Basin Unit
- 3K North Lower Basin Unit

04 MIDDLE ST. JOHNS RIVER
- 4A Econlockhatchee River
- 4B Deep Creek Unit
- 4C Lake Jessup
- 4D Lake Monroe Unit
- 4E Wekiva River

05 LAKE GEORGE
- 5A Lake Woodruff Unit
- 5B Alexander Springs Creek
- 5C Lake George Unit
- 5D Lake Kerr Unit

06 UPPER ST. JOHNS RIVER
- 6A Fort Drum Creek Unit
- 6B Blue Cypress Creek Unit
- 6C Fellsmere
- 6D Interbasin Diversion
- 6E Jane Green Creek
- 6F St. Johns Marsh
- 6G Lake Poinsett Unit
- 6H Tosohatchee Unit
- 6I Puzzle Lake Unit

07 OCKLAWAHA RIVER
- 7A Palatlakaha River
- 7B Lake Apopka
- 7C Lake Harris Unit
- 7D Lake Griffin Unit
- 7E Marshall Swamp Unit
- 7F Lake Ocklawaha Unit
- 7G Orange Creek

08 FLORIDA RIDGE
- 8A Florida Ridge Unit

09 UPPER COASTAL
- 9A Halifax River
- 9B Pellicer Creek Unit
- 9C Matanzas River
- 9D Tolomato River

10 INDIAN RIVER LAGOON
- 10A Mosquito Lagoon
- 10B Banana River
- 10C N. Indian River Lagoon
- 10D N. Central Indian River Lagoon
- 10E S. Central Indian River Lagoon

EXHIBIT 3

Wildlife Surveys

Survey methodologies employed to inventory the site must be in compliance with the Florida Game and Freshwater Fish Commission (FGFWFC) Wildlife Methodology Guidelines for Section 18.0 of the Application for Development Approval, dated January 15, 1988, or a comparable, well-documented alternative methodology. Applicants are encouraged to consult with the FGFWFC staff when selecting and developing survey methodologies. The methodology, supporting documentation, and survey results must be presented with the application and must provide a reasonable degree of assurance regarding the presence or absence, and abundance of the subject species.

Listed species vary in their degree of detectability. Certain species (Group A, identified on Exhibit 2) have a high degree of visibility and appropriate sampling techniques provide reliable estimates of species presence or absence. Other species (Groups B and C, identified on Exhibit 2) tend to be difficult to inventory due to their reclusive nature or seasonality of appearance. From a field sampling perspective, investigators should be knowledgeable of the differences certain species exhibit with regard to seasonality of occurrence and cryptic behavior. For this reason, species identified on Exhibit 2 have been assembled into three groups, according to detectability. The species groups are based upon the following:

GROUP A – The presence or absence of species in this grouping, where suitable habitat is present, is determined by the use of appropriate sampling methodologies. Sampling for these species is cost effective and results generally provide reliable estimates of species presence or absence. Surveys will be utilized to determine the presence or absence of these species on the site.

GROUP B – Species in this group are presumed present when a site contains suitable habitat for a species and falls within the known geographic range of a species. Sampling efforts require special techniques and manpower commitments and are generally not cost effective. However, the presumption of species occurrence may be rebutted by the results of a District approved sampling program.

GROUP C – Species in this group are considered present when a site contains suitable habitat for a species and falls within the known range of the species. Sampling efforts are too ineffective to provide reliable indications of species absence or presence within a site.

Ex. 172

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FL

CIVIL ACTION CI 90-3699

COY A. KOONTZ,

Plaintiff,

vs.

ORANGE COUNTY,
FLORIDA and STATE OF
FLORIDA DEPARTMENT
OF TRANSPORTATION,

Defendants,
_____/

STIPULATED FINAL JUDGMENT
AND JOINT MOTION FOR ENTRY

(Filed Jun. 9, 1995)

THIS CAUSE having come on to be heard upon the Joint Motion for the entry of a Final Judgment made by the Plaintiff and the Defendant, set forth herein below, and it appearing to the Court that the parties were authorized to enter into such motion, and the court being fully advised in the premises, it is now, therefore,

ORDERED AND ADJUDGED that Defendant, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, shall, within sixty (60) days of entry of this Final Judgment, execute a quitclaim deed in favor of Plaintiff in the form attached hereto as Exhibit "A", and it is further

ORDERED AND ADJUDGED that Plaintiff shall, within sixty (60) days of entry of this Final Judgment, execute a perpetual drainage easement in favor of Defendant, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, in the form attached hereto as Exhibit "B". The legal description for the area to be conveyed in the warranty deed shall be prepared, incorporated into said warranty deed and presented to Plaintiff by the Defendant, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, within thirty days (30) of entry of the Final Judgment. Said legal description shall encompass the existing channelized drainage ditch along the western boundary of Plaintiff's property and perpendicular to State Road 50, and it is further

ORDERED AND DIRECTED that within thirty (30) days of the date of receipt of a conformed copy of this Final Judgment, the Defendant, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, shall pay the sum of $7,500.00 (SEVEN THOUSAND FIVE HUNDRED AND 00/100 DOLLARS) to [Coy Koontz c/o] Griffin and Linder, P.A., Suite 1550, Firstate Tower, 255 South Orange Avenue, Orlando, Florida 32801.

ORDERED AND DIRECTED that this Court shall reserve jurisdiction to enforce the terms of this Final Judgment.

DONE AND ORDERED at Orlando, Orange County, Florida this 8 day of June, 1995.

/s/ [Illegible]
JOSEPH P. BAKER
CIRCUIT JUDGE

JOINT MOTION

The parties respectfully move for the entry of the foregoing Final Judgment this 31st day of May, 1995.

/s/ George S. Lovett
George S. Lovett,
Esquire
Office of General Counsel
State of Florida
Department of
Transportation
719 South Woodland
Boulevard
DeLand, Florida 32720
(904) 943-5490
Florida Bar No. 623768

/s/ Paul R. Linder
Paul R. Linder,
Esquire
Griffin & Linder, P.A.
Suite 1550,
Firstate Tower
255 South
Orange Avenue
Orlando, Florida 32801
(407) 425-2518
Florida Bar No. 346341
Attorney for Plaintiff

EXHIBIT A

This instrument prepared by,
or under the direction of,
George S. Lovett,
General Counsel
Department of Transportation
719 South Woodland Boulevard
DeLand, Florida 32720
(904) 943-5490

Parcel	N/A
Section	75060
SR	50
County	Orange

QUITCLAIM DEED

THIS QUITCLAIM DEED Made the _____ day of _____, 199___, by STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, grantor to COY A. KOONTZ, grantee; (wherever used herein the terms "grantor" and "grantee" include all the parties to this instrument and the heirs, legal representatives and assigns of individuals and the successors, and assigns of organizations).

WITNESSETH: That the said grantor, for and in consideration of the sum of $1.00 and other valuable considerations, receipt and sufficiency being hereby acknowledged, does hereby remise, release and quitclaim unto the said grantee forever, all right, title, interest claim and demand, which said grantor has in and to the hereinafter described parcel of land arising out of that certain Outfall Ditch Easement Deed, between Marjorie and W. K. Price and the State of Florida, dated November 13, 1944, recorded in Official Records Book 722, Page 406, of the Public Records of Orange County, Florida together with all

other right, title, interest, claim and demand, if any which the said grantor has in and to said parcel situate in the County of Orange, Florida, viz:

That part of the NE 1/4 of NW 1/4 and the SE 1/4 of NW 1/4 of Section 23, Township 22 South, Range 31 East lying within 30 feet of the following described ditch centerline:

Commence on the East boundary of the NW 1/4 of Section 23 at a point 1268.51 feet South of the NE corner thereof and run thence South 88°28'29" West 624.15 feet to Station 580+75.47 on State Road 22, the POINT OF BEGINNING of said ditch centerline; thence run South 1°31'31" East 50 feet; thence South 6°45'29" West 50.53 feet to the South right of way line of State Road 22, thence continue South 6°45'29" West 143.02 feet; thence South 19°20'31" East 276.45 feet to the end of said ditch centerline. Exclusive of existing right of way, according to the Orland-Orange County Expressway Authority, Parcel 4-135, recorded in Official Book 4067, Page 0048, Public Records of Orange County, Florida. Said land being a portion of the lands that are described in Deed Book 722, Page 406, Public Records of Orange County, Florida.

Containing 21,350 square feet, more or less.

TO HAVE AND TO HOLD the same together with the appurtenances thereunto belonging or in anywise appertaining, and all the estate, right, title, interest, lien, equity and claim whatsoever of the said

grantor, either in law or equity, to the said grantee forever.

IN WITNESS WHEREOF, the said grantor has signed and sealed these presents the day and year first above written.

Signed, sealed and delivered
in the presence of: (Two
witnesses required by
Florida Law)

_____
Nancy M. Houston
District S Secretary
State of Florida
Department of Transportation

_____
Witness Signature

_____
Witness Name (Printed or Typed)

_____
Witness Signature

_____
Witness Name (Printed or Typed)

STATE OF _____

COUNTY OF _____

The foregoing instrument was acknowledged before me this ___ day of _____, 199___, by

Nancy M. Houston, who is personally known to me, and who did take an oath.

_____

Notary Public in and for the
County and State last aforesaid.
My Commission Expires: _____
Serial No., if any: _____

_____

This instrument prepared by,
or under the direction of,
George S. Lovett, General
Counsel
Department of Transportation
719 South Woodland Boulevard
DeLand, Florida 32720
(904) 943-5490

Parcel	N/A
Section	75060
SR	50
County	Orange

PERPETUAL DRAINAGE EASEMENT

THIS EASEMENT made this ___ day of _____, 199___, by COY A. KOONTZ, grantor, to the STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, its successor and assigns, grantee.

WITNESSETH: That the grantor for and in consideration of the sum of One Dollar and other valuable considerations paid, the receipt and sufficiency of which is hereby acknowledged, hereby grants unto the grantee, its successors and assigns, a perpetual easement for the purpose of constructing and maintaining outfall and drainage ditches in, over,

under, upon and through the following described land in Orange County, Florida, viz:

Provided, however, that the drainage rights granted hereunder shall be limited to the stormwater runoff from State Road 50 and the surrounding right of way as presently configured, and that if Grantee shall make any future road improvements, Grantee agrees that additional drainage runoff from said improvements shall not be directed through the subject drainage easement without acquiring additional drainage rights from Grantor. Grantor reserves the right to utilize any ditch constructed within the easement for the purposes of draining his adjacent remaining parcel.

SEE EXHIBIT "A"

TO HAVE AND TO HOLD the same unto said grantee, its successors and assigns forever, together with immunity unto the said grantee, its successors and assigns from all claims for damage, if any, arising from or growing out of such construction and/or maintenance to the lands, if any, owned by the grantor, lying adjacent or contiguous to the lands hereinabove described and the grantor will defend the title to said lands against all persons claiming by, through or under said grantor.

EXHIBIT "B"

IN WITNESS WHEREOF, the said grantor has signed and sealed these presents the day and year first above written.

Signed, sealed and delivered
in the presence of: (Two
witnesses required by
Florida Law)

/s/ Coy A. Koontz
Coy A. Koontz

Paul R. Linder
Witness Signature

Paul R. Linder
Witness Name (Printed or Typed)

Kristina M. Pope
Witness Signature

Kristina M. Pope
Witness Name (Printed or Typed)

STATE OF Florida

COUNTY OF Orange

The foregoing instrument was acknowledged before me this 31st day of May, 1996, by Coy A. Koontz, who is personally known to me or who has produced _____ as identification, and who did (did not) take an oath.

/s/ Christina D. Lidman
Notary Public in and for the
County and State last aforesaid.
My Commission Expires: _____
Serial No., if any: _____

[LOGO]

PARCEL NO. 215 SECTION NO. 7506-201
DITCH STATION 580+75.47 RIGHT

That part of the East 1/2 of the Southeast 1/4 of the Northwest 1/4 of Section 23, Township 22 South, Range 31 East, Orange County, Florida, more particularly described as follows:

Commence at the Southwest corner of the Northwest 1/4 of said Section 23;thence run North 89°21'24" East along the south line of said Northwest 1/4 is distance of 2004.07 feet to the Southwest corner of the East 1/2 of the Southeast 1/4 of the Northwest 1/4 of said Section 23;thence North 01°38'35" West along the West line of the East 1/2 of the Southeast 1/4 of the Northwest 1/4 of said Section 23 a distance of 282.93 feet for a POINT OF BEGINNING; thence continue North 01°38'35" West along said West line a distance of 871.93 feet to the South line of the Orlando-Orange County Expressway Authority Right of Way Parcel 4-135 as described in Official Record Book 4067, Page 0048, Public Records of Orange County, Florida;thence North 88°28'29" East along the South line of said parcel a distance of 60.00 feet to a point being 60.00 feet Easterly of as measured perpendicular to the West line of the East 1/2 of the Southeast 1/4 of the Northwest 1/4 of said Section 23;thence South 01°38'35" East parallel with said West line a distance of 871.81 feet;thence departing said parallel line run South 88°21'25" West a distance of 60.00 feet to the POINT OF BEGINNING.

Containing 1.201 acres, more or less.

Ex. 182

This Legal Description Prepared Under the Direction Of:
Kimberly A. Buchheit, P.L.S. # 4838
Buchheit Associates, Inc.
Surveyors & Mappers
401 Whooping Loop, Suite 1550
Altamonte Springs, Florida 32701.

Record Verified – Martha D. Haynie

Ex. 183

APPRAISAL SUMMARY OF
14.21 ACRES OF VACANT LAND
LOCATED
ALONG THE SOUTH SIDE OF STATE ROAD 50, JUST EAST OF EAST-WEST EXPRESSWAY EASTERN EXTENSION, ORANGE COUNTY, FLORIDA

FOR

ST. JOHNS RIVER
WATER MANAGEMENT DISTRICT
POST OFFCE BOX 1429
PALATKA, FLORIDA 32178-1429

DATE OF VALUATION: JUNE 9, 1994
DATE OF REPORT: APRIL 17, 2002

AN ADDENDUM TO CRM NO: 01-094

PREPARED BY:

PAUL M. ROPER, MAI, SRA
STATE-CERTIFIED
GENERAL APPRAISER
LICENSE NUMBER: RZ 0000141

APPRAISAL SUMMARY

LOCATION OF SUBJECT PROPERTY

The subject is located at the southwest corner of State Road 50 and Bonneville Drive. More specifically, the subject property is located on the south side of State Road 50, approximately 200 feet east of the Eastern Extension of State Road 408 (East-West Expressway), in unincorporated Orange County, Florida.

EFFECTIVE DATE OF THE APPRAISAL

June 9, 1994 – the date of the St. Johns River Water Management District permitting action.

DESCRIPTION OF PROPERTY

14.21 acres of gross land area. The northernmost 2.45 acres of the property was zoned Neighborhood Retail Commercial and the remaining 11.76 acres was zoned Single-Family Dwelling District. A 100-foot wide transmission line easement (including physical transmission towers and lines) runs east-west across the entire width of the subject property. The easement is located approximately 300 feet south of State Road 50.

Additionally, a 60-foot wide drainage ditch runs north/south from the north boundary of the subject property to the south, where it terminates less than 200 feet from the south boundary. A second ditch, referred to as an outfall ditch, runs along the west side of the subject property for approximately 100 feet, then runs approximately 75 feet eastward towards the center of the subject property where it terminates. The existing drainage of the site is to an un-named tributary that runs through the site and eventually discharges into the Econlockhatchee River. Separately, there is an existing open channel ditch that flows from north to south along the west property line. Drainage from neighboring properties to the north and south also flows to this ditch. Eventually, the ditch directs drainage flow into the un-named tributary. Forty

percent of the subject property lies within the 100-year flood plain.

HIGHEST AND BEST USE

A. Value Before the Permitting Action

The subject property is to be valued on a vacant *proposed developable acre* basis of 3.75 acres. Based upon the May 1993 plans submitted by Coy A. Koontz to the St. Johns River Water Management District, the 3.75 acre figure includes proposed development of 2.5 acres for building pavement and parking improvements, in addition to the development of approximately 1.25 acres for retention/detention purposes.

From a physical standpoint, it has been determined that up to about 3.75 acres of land area, 1 situated on the north portion, could be developed on the subject property provided that: 1) De-mucking of wetlands and the importation of fill is accounted for, 2) Off-site mitigation in the amount of 50 acres is provided for, and 3) On-site mitigation in the form of a Conservation Easement or a Deed Restriction over the remaining undeveloped 10.46 acres of the subject property is granted by the property owner.

Based upon completed comparable sales transactions, adjusted for improved market conditions and certain physical and locational dissimilarities, the unit value indication ranged from $3.05 per square foot to $3.24 per square foot. In this scenario, the subject property is projected to contain 3.75 acres of *proposed*

developable acreage, or 163,350 square feet. Consequently, the land value estimate before the St. Johns River Water Management District permitting action was estimated to be $522,720, rounded to **$523,000**.

In order for the subject property to achieve parity with comparable sales, the expenses necessary to improve the subject property to the extent that it reflects developable land are considered, namely:

(1) **$45,967** for the de-mucking of wetlands and the importation of fill,

(2) **$10,000** for the enhancement of 50 acres of off-site wetlands, and

(3) **$10,000** for the granting of a Conservation Easement or Deed Restriction, over the remaining 10.46 acres of undeveloped land area on the subject property.

The total value of the property ***before*** the St. Johns River Water Management District permitting action would be:

$523,000	(Property Value)
$45,967	(De-mucking & fill)
$477,000	(R) (Value Before Permitting Action)

B. Value After the Permitting Action

With $20,000 off-site enhancement and on-site mitigation costs to satisfy the St. Johns River Water Management District permitting action, the value *after* the permitting action would be:

$477,000	(Value Before Permitting Action)
$20,000	(Mitigation Costs)
$457,000	(R) (Value After Permitting Action)

C. Degree of Diminution in value

$20,000 or reduction of less than 5% in value

This is a Summary and hereby made an Addendum to the Full Summary Complete Appraisal Report of this property identified as CRM No. 01-094.

Respectfully submitted,

CLAYTON, ROPER & MARSHALL

s/
Paul M. Roper, MAI, SRA
State-Certified General Appraiser
License Number: RZ 0000141

PETITIONER'S BRIEF

No. 11-1447

In the
Supreme Court of the United States

COY A. KOONTZ, JR.,
Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

PETITIONER'S BRIEF ON THE MERITS

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Counsel for Petitioner

QUESTIONS PRESENTED

For over eleven years, a Florida land-use agency refused to issue any of the permits necessary for Coy A. Koontz, Sr., to develop his commercial property. The reason was because Koontz would not accede to a permit condition requiring him to dedicate his money and labor to make improvements to 50 acres of government-owned property located miles away from the project—a condition that was determined to be wholly unrelated to any impacts caused by Koontz's proposed development. A Florida trial court ruled that the agency's refusal to issue the permits was invalid and effected a taking of Koontz's property. After the appellate court affirmed, the Florida Supreme Court reversed, holding that, as a matter of federal takings law, a landowner cannot state a claim for violation of the Takings Clause under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), where (1) permit approval is withheld based on a landowner's objection to an excessive exaction, and (2) the exaction demands dedication of personal property to the public.

The questions presented are:

1. Whether the government violates the Takings Clause when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan* and *Dolan*;[1] and

---

[1] Pursuant to Rule 24.1 of this Court, Mr. Koontz has altered the phrasing of the introductory paragraph and of the first Question

(continued...)

2. Whether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.

---

[1] (...continued)
Presented to more accurately reflect the procedural posture of this case.

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OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220 (Fla. 2011), and is reproduced in Petitioner's Appendix to the Petition for Writ of Certiorari (Pet. Cert. App.) at A. The Florida Supreme Court's decision denying rehearing and/or clarification is reported at No. SC09-713, 2012 Fla. LEXIS 1 (Fla. Jan. 4, 2011). The opinion of the District Court of Appeal of the State of Florida, 5 So. 3d 8 (Fla. Ct. App. 2009), is reproduced in Pet. Cert. App. at B. The opinion of the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, is not published, but is reproduced in Pet. Cert. App. at D.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). Mr. Koontz filed a lawsuit in the Florida state courts challenging a permit denial under state law, on the grounds that the denial resulted from refusal to accede to an unlawful permit condition. Mr. Koontz prevailed in the Florida trial and appellate courts, which held that the permit condition was unconstitutional under this Court's decisions in *Nollan* and *Dolan* interpreting the Fifth Amendment's Takings Clause, applied to the states via the Fourteenth Amendment. The Florida Supreme Court reversed in an opinion dated November 3, 2011. The Florida Supreme Court's decision became final on January 4, 2012, when the court denied Mr. Koontz's motion for reconsideration and/or clarification. The Court granted certiorari on October 5, 2012.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Eighteen years ago, Coy Koontz, Sr.,[2] embarked on a struggle against an environmental agency to develop a small portion of his lot, located at a busy intersection of two major highways in Orange County, Florida. J.A. 187 (map of property). When he applied for permits from Respondent St. Johns River Water Management District, the District demanded that he give up 75% of his land to the State *and* perform costly off-site improvements to government-owned property. Pet. Cert. App. A-6. When Mr. Koontz rejected the District's "deal," the District outright denied him his permits and, along with it, his ability to use his land. Pet. Cert. App. D-4; J.A. 70-71. Believing that no

[2] Coy Koontz, Sr., was Petitioner Coy Koontz, Jr.'s, father. In 2000, Mr. Koontz, Sr., died. His son, Coy Koontz, Jr., became the personal representative of the estate and the Plaintiff/Petitioner in this action.

property owner should have to submit to excessive government demands just to make lawful use of his property, Mr. Koontz sued. And thus began this 18-year old legal battle.

A. Mr. Koontz Applies for Permits To Make Lawful Use of a Small Area of His Property

When Mr. Koontz purchased his vacant 14.9-acre lot in 1972, land-use laws permitted him to make full use of his property. Pet. Cert. App. A-5 & n.2.; J.A. 27-28. But over the years, state and local regulations whittled away at his ability to do so. For example, in 1985, the State enacted an environmental statute and implementing regulations to control the use of private property containing wetlands and uplands suitable for fish and wildlife habitat. J.A. 27, 67. As a consequence of those laws, all but 1.4 acres of Mr. Koontz's property suddenly were swept into a Riparian Habitat Protection Zone overseen by the District. Pet. Cert. App. A-5.

Florida's inclusion of portions of Mr. Koontz's land in the Riparian Habitat Protection Zone did not mean the land contained riparian habitat. Instead, the designation created a legal presumption that any use of land within the zone was harmful to such habitat, therefore requiring affected landowners to obtain environmental permits from the District. J.A. 33. Thus, Mr. Koontz not only had to comply with routine land-use regulations, like zoning laws, but also strict environmental regulations enforced by the District.

In 1994, Mr. Koontz submitted applications to the District for permits to develop 3.7 acres within the Riparian Habitat Protection Zone. Pet. Cert. App. A-

5—A-6; Pet. Cert. App. D-4. But given its location at the intersection of two highways, the project site had little, if any, habitat that needed protection. Pet. Cert. App. D-3. Any wetlands that may have once existed on the project site had been drained by a ditch that the State ran across Mr. Koontz's land. J.A. 116, 137. When experts inspected the property, the only standing water on the project site lay in ruts along an easement road owned by the State, and used and maintained by a power company. J.A. 117-18, 142-43. Residential and commercial development, road construction, and other government projects already had seriously degraded the proposed site from its original condition and rendered it inhospitable to animal habitat. Pet. Cert. App. D-3; *see also* J.A. 101-02, 111-19, 137-39 (describing conditions in project area). Indeed, the only wildlife found on the project site was common, non-threatened species typically found in developed areas, such as raccoons, birds, and opossums. J.A. 105-06, 139-41. And on some areas of the project site that had been designated by the District as "wetlands," homeless shelters and campfires were found. J.A. 118, 143-44.

Nevertheless, *as required by District regulations*, Mr. Koontz included in his permit applications mitigation for the presumed disturbance to riparian habitat. Pet. Cert. App. A-6; Pet. Cert. App. D-4; J.A. 29-30, 107. Specifically, he offered to place the remaining eleven acres of his property into a conservation easement. *Id.* Mr. Koontz thought that giving away about 75% of his property to the District would be more than enough to satisfy it. J.A. 29-30, 107, 119-20; *see also* J.A. 111, 119, 139 (expert conclusions that conservation area was sufficient to mitigate any impacts; additional mitigation was

unnecessary and excessive). But he was sorely mistaken.

B. The District Denies Mr. Koontz's Permit Applications After He Refuses the District's Demand To Finance Improvements to District-Owned Property

The morning of the hearing on his applications before the District's Governing Board, Mr. Koontz was dealt a surprise by the District's staff. J.A. 103, 108-09. The staff told him they would recommend *denial* of the permit applications unless, in addition to the eleven-acre dedication, he agreed to finance the restoration and enhancement of at least 50 acres of wetlands on District-owned property located miles away, by replacing culverts or plugging ditches, and building a new road. J.A. 26, 103-04, 109. In other words, to obtain the permits he needed to use his property, Mr. Koontz would have to agree to dedicate his money to unrelated public improvements on the District's land. Pet. Cert. App. A-6; Pet. Cert. App. D-4; J.A. 70-71, 122-23.

At no time did District staff ever demonstrate how Mr. Koontz's project—located on a relatively small corner of his property—could justify imposition of either the land grab or the requirement that he finance off-site public improvements. Instead, the District explained that, because the property was located within its Riparian Habitat Protection Zone, *any* use was "presumed to be harmful." J.A. 33. The District's staff admitted that they had disregarded several experts who concluded that the project area was degraded and fractured, had not performed any surveys of the project site to determine the presence of

riparian habitat, and had no evidence to refute Mr. Koontz's contrary studies. J.A. 146.

Eager to avoid any delays and difficulties in obtaining the permits he needed to use his property, Mr. Koontz agreed to the eleven-acre dedication of land. J.A. 29-30. But the requirement that he finance work on the District's property was the straw that broke the camel's back. J.A. 29-30, 107. To give away most of his land *and* to finance costly improvements to the District's land miles away were too much for Mr. Koontz to bear and raised serious concerns about the continued economic feasibility of his modest project. J.A. 29-30, 34-35, 100, 105. Adding insult to injury, the District explained that it had discounted the mitigation value of the eleven-acre dedication because it (wrongly) believed that Mr. Koontz had "already lost that [portion of his land] due to regulation"—"it's no fun, but that's the facts of life." J.A. 39, 107.

At the hearing before the District's Governing Board, Mr. Koontz refused to acquiesce to the second exaction. Pet. Cert. App. D-4. Consequently, the Board denied his permit applications. *Id*; J.A. 70-71. As the District readily concedes, "the denials were based exclusively on the fact that [Mr. Koontz] would not provide additional mitigation to offset impacts from the proposed project"—*i.e.*, restoration and enhancement of the District's property. J.A. 70. Importantly, if Mr. Koontz had acceded to this condition, "the exact project [he] proposed would have been permitted." J.A. 71.

Without the permits, Mr. Koontz could not use his property. Pet. Cert. App. A-5 - 6. Unless he agreed to finance the improvements to the District's lands, the

District would hold his property hostage. J.A. 70-71. The District would not budge, with one Board member even telling Mr. Koontz that, if he did not want to comply with its demand, he should just "get on with it" and file a lawsuit. J.A. 40. Faced with the District's unsavory ultimatum—"your money or your land!"—Mr. Koontz did just that and sued.

C. Mr. Koontz Sues and Prevails in the Trial and Appellate Courts, Which Hold That the District's Public-Improvements Exaction Is an Unconstitutional Condition

In late 1994, Mr. Koontz filed an action against the District in Florida state court for damages under state law. J.A. 4-65 (the operative complaint). His claim ultimately was tried in 2002 on the question of "whether the off-site mitigation required by the District was an unreasonable exercise of police power" constituting a taking without just compensation, under section 373.617(b) of the Florida Statutes. Pet. Cert. App. B 19 n.3.

The trial court entered judgment for Mr. Koontz, reserving jurisdiction to award monetary damages authorized by section 373.617(b) until after the District responded to the judgment. Pet. Cert. App. D-11. The court relied on two of this Court's federal takings precedents—*Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*—to conclude that the District's exaction requiring off-site public improvements on government land was unconstitutional under the Takings Clause of the Fifth Amendment to the United States Constitution, as applied to the states via the Fourteenth Amendment.

Pet. Cert. App. D-5 - 6, 10 - 11; Pet. Cert. App. B-19 n.3; J.A. 95.

Nollan and *Dolan* are takings tests applied in the unique context of land-use permitting to ensure that government agencies do not unconstitutionally condition the issuance of permits on applicants' waiver of constitutionally protected rights—namely, the right to compensation for confiscated property. In *Nollan*, this Court held that a land-use agency could demand uncompensated dedication of an easement over a permit applicant's property, but only if the easement bore an "essential nexus" to the impact of the applicant's proposed use for the property. *Nollan*, 483 U.S. at 837. In *Dolan*, the Court held that, in addition to an "essential nexus," there must also be "rough proportionality" between the permit exaction and the impact of the proposed use. *Dolan*, 512 U.S. at 391.

Applying *Nollan* and *Dolan*, the trial court in this case found that the District "did not prove the necessary relationship between the condition of off-site mitigation and the effect of development." Pet. Cert. App. D-11. The court explained that the District failed to show either an "[essential] nexus between the required off-site mitigation and the requested development of the tract[]" as required in *Nollan*, or "rough proportionality to the impact of site development," as required in *Dolan*. *Id.* Accordingly, the trial court concluded that the District's "denial of the Koontz permit application . . . was invalid" as "an unreasonable exercise of police power." *Id.* at 10-11.

In light of the judgment, the District had three choices under state law: (1) agree to issue the permits, (2) agree to pay damages, or (3) agree to modify its

decision to avoid the unreasonable exercise of police power. Fla. Stat. § 373.617(3). The District chose to approve Mr. Koontz's permit applications without the unlawful exaction. Pet. Cert. App. A-7. The trial court ordered the District to issue the permits by June 2004, but the District delayed issuing the permits until December 2005—over eleven years after it denied the permit applications. Pet. Cert. App. A-7; J.A. 183. As provided in the Florida statute under which Mr. Koontz maintained his claim, the trial court subsequently awarded Mr. Koontz damages resulting from the District's unlawful denial of the permit applications. Pet. Cert. App. C-2 (making award of damages); *see also* Fla. Stat. § 373.617(2) (providing for "monetary damages and other relief" for "an unreasonable exercise of the state's police power constituting a taking without just compensation").

On appeal, the District did not dispute the trial court's factual findings that no essential nexus or rough proportionality connection existed between the District's exaction and the impact of Mr. Koontz's project. Pet. Cert. App. B-6 ("The District makes no challenge to the evidentiary foundation for [the trial court's factual findings."). Instead, the District argued that Mr. Koontz had no cause of action under section 373.617(2), because *Nollan* and *Dolan* were inapplicable to the challenged exaction. Pet. Cert. App. B-6—B-7, n.3. First, the District argued that *Nollan* and *Dolan* do not apply to exactions imposed prior to permit issuance, but only to those exactions attached to the issuance of a permit. Pet. Cert. App. B-6. The District claimed that, because it issued no permits until after the trial court invalidated the condition, it never imposed an exaction, making *Nollan* and *Dolan* review unavailable to Mr. Koontz to begin with. Pet.

Cert. App. B-6. Second, the District argued that *Nollan* and *Dolan* apply only to real-property exactions, not to monetary exactions. Pet. Cert. App. B-9.

The appellate court rejected the District's arguments. It held that *Nollan* and *Dolan* apply to all property exactions, including monetary ones, that are imposed prior to permit issuance. Pet. Cert. App. B-8—B-10. Because the District did not dispute that, if *Nollan* and *Dolan* applied, its permit exaction would fail the "essential nexus" and "rough proportionality" tests (Pet. Cert. App. B-6), the court upheld the trial court's judgment of liability against the District. Pet. Cert. App. B-10.

D. The Florida Supreme Court Reverses, Declaring That the District's Public-Improvements Exaction Is Not Subject to Constitutional Scrutiny

The Florida Supreme Court reversed. First, the court held that *Nollan* and *Dolan* do not apply to monetary exactions, like the one imposed by the District. Misconstruing *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), and *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), the court held that this Court must have intended for *Nollan* and *Dolan* to be strictly limited to their facts. Pet. Cert. App. A-15—A-16. The court did not try to reconcile its cramped reading of *Nollan* and *Dolan* with the underlying logic and purpose of those precedents.

Second, the court held that *Nollan* and *Dolan* did not apply to the District's exaction, because the District "did not issue [the] permits" and "nothing was ever taken from Mr. Koontz." Pet. Cert. App. A-21 (original

emphasis omitted). The court assumed that, in *Nollan* and *Dolan*, the land-use agencies had issued permits after actually taking the exacted property. The court did not consider that, in both *Nollan* and *Dolan*, the agencies actually had imposed the exactions *prior* to issuance of the permits and that no property had ever changed hands from the owners to the agencies—facts that mirror exactly what happened here.

The Florida Supreme Court reversed the court of appeal's opinion affirming the judgment in Mr. Koontz's favor and his damages award. Pet. Cert. App. A-21.

SUMMARY OF ARGUMENT

The District's demand that Mr. Koontz finance improvements to its property as a condition of permit approval—*in addition to giving up almost 75% of his land*—was an exaction implicating the Takings Clause and, therefore, triggering review under *Nollan* and *Dolan*. The District forced Mr. Koontz to choose between two fundamental constitutional rights: (1) the right to make lawful use of his property and (2) the right under the Takings Clause to compensation for the substantial cost incurred making unrelated public improvements. When Mr. Koontz would not agree to waive his right to compensation for the cost incurred making the off-site improvements, the District denied his permit applications. The District's attempt to bargain its way around the Takings Clause's requirement that property taken for a public use be compensated is precisely the kind of government "deal-making" the unconstitutional conditions doctrine, as applied in *Nollan* and *Dolan*, is meant to check.

The doctrine has long been a staple of this Court's jurisprudence. In its most basic formulation, the doctrine provides that government may not grant an individual a benefit or permit to exercise a constitutional right on the condition that he surrender another constitutional right. The doctrine has shielded countless Americans who seek a government benefit or permit from government "deals" that would strip them of their constitutionally protected rights, including the right to free speech, the right to free exercise of religion, and the right to be free from unreasonable searches. In 1987, this Court expressly recognized the doctrine's applicability in the land-use context in *Nollan* and, subsequently, in *Dolan*.

While the Takings Clause generally prohibits uncompensated takings, the Court in *Nollan* recognized a narrow exception to that general rule: In the land-use context, the government has the discretion to exact property—without having to pay for it—as a condition of permit approval. But the Court went on to place a vital limitation on that exception. Only those exactions that bear an "essential nexus" to the alleged adverse impact of the proposed land use are authorized; as the unconstitutional conditions doctrine teaches, any other exaction is merely an unlawful attempt to skirt the Takings Clause's prohibition on uncompensated takings and therefore is an unconstitutional condition. Later, in *Dolan*, the Court refined the "essential nexus" test, requiring that any permit exaction must also be "roughly proportional" to the alleged adverse impact of the proposed land use. The discretion and the limitations go hand-in-hand: The Takings Clause does not allow the government unbridled power to confiscate property of any kind,

whenever and however it wants, simply because it holds the power to issue land-use permits.

While rooted in the Takings Clause, *Nollan* and *Dolan* rely on the unconstitutional conditions doctrine to smoke out attempts by government agencies to circumvent that Clause's requirement that compensation be paid for property takings. Nothing in that doctrine, the Takings Clause, *Nollan*, or *Dolan* recognizes a relevant distinction among the *types* of permit exaction subject to the "essential nexus" and "rough proportionality" limitations. Government demands for real or personal property—both categories protected by the Takings Clause—are subject to the same limitations. Nor does application of the limitations depend upon *when* in the permit process the exaction is imposed. A decision to deny a permit application based on refusal to accede to an unlawful exaction and a decision to approve a permit application subject to acceptance of an unlawful exaction are substantively identical: In both cases, no permit issues unless and until the permit applicant agrees to waive his right to compensation for the confiscated property.

The Florida Supreme Court's decision to the contrary fails to take into account the logic of *Nollan* and *Dolan*. Uncompensated takings in the land-use context are permissible *only* because such takings are limited by the "essential nexus" and "rough proportionality" tests in *Nollan* and *Dolan*. If those limitations do not apply, neither does the exception to the Takings Clause's prohibition against uncompensated takings recognized in those precedents. In other words, the Takings Clause does not countenance a totally *unlimited* power to confiscate

property in the permit process. Thus, if *Nollan* and *Dolan* do not apply to the District's exaction of Mr. Koontz's money, then the District must accept the Takings Clause's default rule prohibiting government from confiscating permit applicants' property. The Florida Supreme Court's decision confining the "essential nexus" and "rough proportionality" limitations to the narrow facts of those cases ignores the interdependence between the limitations and the extraordinary power that the government has to exact property from permit applicants.

The decision also leaves Floridians with little to no protection against government attempts to "cloak[] within the permit process 'an out-and-out plan of extortion." *Lambert v. City & Cnty. of San Francisco*, 529 U.S. 1045, 1048 (2000) (Scalia, Kennedy, and Thomas, JJ., dissenting from denial of certiorari) (internal citations omitted). Naked, uncompensated confiscations of land are uncommon, because of the obvious application of *Nollan* and *Dolan*. Instead, land-use authorities increasingly have resorted to confiscating property other than interests in real property—most often, money, in the form of either financing of public projects (as in Mr. Koontz's case) or payment of fees in-lieu of a land dedication. Yet the constitutional injury is the same: The property owner is required, as a permit condition, to waive his right to compensation for the confiscation. If the Florida Supreme Court's decision stands, that constitutional right will rarely have a remedy.

The Florida Supreme Court based its decision in large part on its desire to preserve the freedom and flexibility of land-use agencies like the District to make "deals" with permit applicants. It did so, but at too

high a cost to the constitutional rights of those applicants. The decision of the Florida Supreme Court should be reversed.

ARGUMENT

I

NOLLAN AND *DOLAN* APPLY TO THE DISTRICT'S PERMIT EXACTION REQUIRING MR. KOONTZ TO FINANCE COSTLY IMPROVEMENTS TO THE DISTRICT'S LAND

A. The Takings Clause Requires *Nollan* and *Dolan* Review of Government Attempts To Confiscate Property in the Land-Use Permit Context

The District conditioned Mr. Koontz's permit approval on his agreement to finance improvements to government-owned property. Pet. Cert. App. A-6. In other words, the District wanted Mr. Koontz to dedicate a sum of his money to a public use, without having to compensate him for the substantial cost incurred making those unrelated improvements. When Mr. Koontz refused, the District denied him his permits. Pet. Cert. App. D-4; J.A. 70-71.

In essence, the District presented Mr. Koontz with the choice to exercise either of two rights—but not both: (1) his constitutional right to make lawful use of his property or (2) his constitutional right to compensation for the cost incurred financing improvements. The Takings Clause protects both.

The Takings Clause protects the right to "exercise[] . . . dominion" over, and "possess, use, and dispose" of, one's property. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998) (The Takings Clause protects interest earned on client funds.); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (regulation denying landowner all economically beneficial use of his property violated Takings Clause). The Clause also guarantees compensation if property is taken for a public use; put differently, it *prohibits* uncompensated takings. U.S. Const. amend. V; *see also Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) ("The Fifth Amendment . . . proscribes taking without just compensation." (citation omitted)).

"Property" under the Takings Clause comprises both tangible (*e.g.*, real-property interests, personal property, money) and intangible property (*e.g.*, intellectual property). *See, e.g.*, *Phillips*, 524 U.S. at 170 (accrued interest); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (trade secrets); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980) (money); *Armstrong v. United States*, 364 U.S. 40, 44-46 (1960) (materialmen's liens); *Lynch v. United States*, 292 U.S. 571 (1934) (contracts); *Vill. of Norwood v. Baker*, 172 U.S. 269, 279 (1898) (money). Moreover, this Court's precedents establish that, in the land-use permit context, property rights are entitled to as much protection from government abuse as any other constitutionally protected right. *Dolan*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

If the District had approached Mr. Koontz—outside the permit context—and directly seized his money to finance the public improvements, the District's action would have been unconstitutional, because it would have violated the Takings Clause's prohibition against uncompensated takings of property. *See, e.g.*, *Sallie Mae v. Riley*, 104 F.3d 397, 402 (D.C. Cir. 1997) (applying takings analysis to "straightforward mandates of cash payment to the government"), *cert. denied*, 522 U.S. 913 (1997); *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 493 (2nd Cir. 1995) (applying takings analysis to government act "requiring direct transfers of money to the government"), *cert. denied*, 516 U.S. 913 (1995). The fact that the District's attempted confiscation took the form of a permit exaction did not, as the Florida Supreme Court held, immunize it from judicial scrutiny under the Takings Clause's compensation guarantee. As the doctrine of unconstitutional conditions teaches, if the District had discretion via the permit process to confiscate property from Mr. Koontz, the Takings Clause imposed discernible limitations on that discretion.

The unconstitutional conditions doctrine is a "well-settled" principle of constitutional law. *Dolan*, 512 U.S. at 395. The doctrine holds that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1415 (1989). The doctrine's purpose is to "identif[y] a characteristic technique by which government appears not to, but in fact does burden [constitutionally preferred] liberties, triggering a demand for especially strong justification by the

state." *Id.* at 1419. If a constitutional provision prohibits a government act, then, under the doctrine, government cannot employ schemes for skirting that prohibition. Simply put, the doctrine recognizes that what a constitutional provision "precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *See, e.g.*, *Rutan v. Republican Party*, 497 U.S. 62, 77-78 (1990). The unconstitutional conditions doctrine has been invoked in almost every area of constitutional law, including takings law in the land-use context. James Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 407 (2009) (The unconstitutional conditions doctrine has been invoked in a wide range of cases in which "government has traded with people for their right to free speech, their right to freedom of religion, their right to be free from unreasonable searches, their right to equal protection, and their right to due process of law."); *see also Rutan*, 497 U.S. at 78 ("Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so."); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978) (holding that a business owner could not be compelled to choose between a warrantless search of his business and shutting down the business, and granting declaratory and injunctive relief); *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a Florida statute unconstitutional as an abridgement of freedom of the press because it forced a newspaper to incur

additional costs by adding more material to an issue or to remove material it desired to print).

In 1987 and 1994, this Court decided *Nollan* and *Dolan*, respectively—precedents involving "a special application of the doctrine of unconstitutional conditions," *Lingle*, 544 U.S. at 547 (internal quotation marks omitted). Together, these cases held that the Takings Clause allows the government to confiscate property as a condition of permit issuance, but only under strict limitations. *Nollan*, 483 U.S. at 837 (Commission can take an easement in the Nollans' property, if the exaction bears an "essential nexus" to the impact of their house); *Dolan*, 512 U.S. at 391 (City can take land from Dolan, if exaction is "roughly proportional" to impact of the project). Permit exactions that violate these limitations are, in light of the doctrine's teachings, unconstitutional conditions. *See, e.g., Dolan*, 512 U.S. at 385 (describing unconstitutional conditions in land-use context).

In *Nollan*, the owners of beachfront property, Pat and Marilyn Nollan, applied to the California Coastal Commission for a land-use permit to replace their bungalow with a single-family home. The Commission approved the permit application subject to various conditions. *Nollan*, 483 U.S. at 828. One condition was that the Nollans dedicate a public-access easement across their private beach. *Id.* The Commission justified the easement exaction on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a 'wall' of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to

visit,' " and would "increase private use of the shorefront." *Id.* at 828-29 (quoting Commission).

The Nollans rejected the exaction and never made the required dedication; consequently, the Commission did not issue them the permit to remodel. *Id.* at 828.; Part II.A.1, *infra* (demonstrating that the Commission approved the Nollans' permit application with conditions, but did not *issue* them a permit). The Nollans filed a writ of mandate under state law to invalidate the permit exaction on the grounds that, if the exaction were consummated, it would effect an uncompensated taking. *Id.* at 828. The Nollans argued that the exaction represented an unlawful attempt by the Commission to take property without compensation, and was therefore unconstitutional under the Takings Clause, because the exaction bore no connection to the impact of their new home. *Id.* at 829.

This Court agreed, holding that the Commission's easement exaction lacked an "essential nexus" to the social evil that the Nollans' project allegedly caused. *Id.* at 837. The Court found that because the Nollans' home had no adverse impact on existing public access, there was no reason why it should have to provide public access by dedicating an easement to the State. *Id.* at 838-39. Without a constitutionally sufficient connection, the easement exaction was "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 837 (citations omitted).

Seven years later, this Court defined how close a fit there should be between a permit exaction and the impact of a proposed land use. In *Dolan*, 512 U.S. 374, Florence Dolan applied to the City of Tigard for a

building permit to expand her store. The City approved the permit application, subject to the condition that she dedicate some of her land for flood-control and traffic improvements. *Id.* at 377.

Ms. Dolan refused to agree to the exactions, did not dedicate any of her land to the City, and consequently did not receive a building permit. *Id.* at 380-82; *see also Dolan v. City of Tigard*, 20 Or. LUBA 411, 413, 1991 Ore. Land use Bd. App. LEXIS 316, at *4 (1991) (describing how permit issuance was conditioned on satisfaction of exactions). She sued the City, alleging that the exactions were unconstitutional under the Takings Clause. *Dolan*, 512 U.S. at 382-3. This Court concluded that while the City had established an essential nexus between the exactions and the impact of the expansion, it did not establish a close enough nexus to pass constitutional muster. *Id.* at 394-95. The Court held that, beyond an essential nexus, there must be rough proportionality —specifically, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391.

The basic holding in *Nollan* and *Dolan* consists of two interrelated propositions. First, in the permit context, the Takings Clause allows government to take property by permit exaction. Second, the Takings Clause puts a limit on the exaction power: authorized confiscations are allowed only if the exaction bears an "essential nexus" and "rough proportionality" to the adverse impact of the owner's proposed use of his land. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391. Conversely, where an insufficient connection exists between the exaction and the adverse impact, the

Takings Clause treats the imposition of the exaction as an attempt by the government to skirt, via the permit process, the Clause's prohibition against uncompensated takings. In that case, the exaction is an unconstitutional condition in violation of the Takings Clause. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 387.

As *Nollan* and *Dolan* show, the need to protect against unconstitutional conditions is especially pronounced in the land-use permit process. A permit exaction that would confiscate property adversely affects, not just *one*, but *two* constitutional rights: (1) the right to make reasonable use of one's land, and (2) the right to be compensated for the exacted property. *Nollan*, 483 U.S. at 833 n.2 (a permit to build upon one's land is a right, subject to legitimate regulation, not a "government benefit"). It is one thing to impose burdensome conditions on a benefit to which there is no right in the first place; it is quite another thing to impose the same conditions on the exercise of constitutionally protected rights, like the right to make reasonable use of one's land. This right is extinguished—removed from the owner's "bundle of sticks"—any time the government issues an ultimatum demanding an excessive exaction as a condition that must be satisfied before issuance of a permit. *Lucas*, 505 U.S. at 1014.

The Court derived the *Nollan* and *Dolan* limitations from the requirements of the Takings Clause. An exaction that fails the "essential nexus" and "rough proportionality" tests is an unconstitutional condition, because it unlawfully requires the property owner to waive the right to compensation for a taking. *Dolan*, 512 U.S. at 385. As the doctrine of

unconstitutional conditions instructs, "government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Id.*; *see also Lingle*, 544 U.S. at 530 (*Nollan* and *Dolan* involve a "special application of the unconstitutional conditions doctrine.").

As *Dolan*'s formulation of the doctrine suggests, the doctrine makes no distinction among the kinds of property that government might attempt to confiscate in the permit process, and sees no relevance in the precise timing of the attempted confiscation. Consistent with the logic and purpose of the unconstitutional conditions doctrine, "[t]he object of the Court's holding in *Nollan* and *Dolan* [is] to protect against the State's cloaking within the permit process 'an out-and-out plan of extortion.'" *Lambert*, 529 U.S. at 1048 (Scalia, Kennedy, and Thomas, JJ., dissenting from denial of certiorari) (internal citations omitted).

That is exactly what the District sought to do in this case—*i.e.*, cloak within the processing of Mr. Koontz's permit applications a "plan of extortion." The District's message to Mr. Koontz was unequivocal: "No permit will issue unless and until you give us eleven acres of your land and finance significant improvements to our land located miles away." The District wanted his land *and* his money—or it would deny him the right to make lawful use of a small portion of his lot. This is precisely the kind of "negotiating" over constitutional rights that the unconstitutional conditions doctrine—via *Nollan* and *Dolan*—was intended to check. And, since the District

never challenged the trial court's factual finding that no connection existed between the off-site-improvement demand and the impact of his project, it is precisely the kind of uncompensated taking of property that the Takings Clause prohibits. Pet. Cert. App. B-6 ("The District makes no challenge to the evidentiary foundation for [the trial court's] factual findings."). The limitations in *Nollan* and *Dolan* readily can and should be applied to the District's permit exaction.

B. Applying *Nollan* and *Dolan* with Equal Force to All Government Attempts To Confiscate Property in the Permit Process Reflects Important Constitutional Values

Exempting the District's permit exaction from review under the "essential nexus" and "rough proportionality" limitations in *Nollan* and *Dolan* produces unintended adverse consequences—particularly for the District and other land-use agencies. As discussed earlier, the basic holding in both *Nollan* and *Dolan* consists of two *inextricable* propositions: (1) in the land-use context, an uncompensated exaction of property is allowed, but (2) only on the condition that the exaction bears an "essential nexus" and "rough proportionality" to the impact of the proposed use. Given the inseparability of these propositions, to say that the limitations do not apply to a particular permit exaction is to say that the entire holding is inapplicable—including that part of the holding that allows uncompensated takings in the first place. The limitations make constitutionally possible the provision of some flexibility to land-use agencies to demand property in the permit context. If the District rejects any limitations on its power to

confiscate property in the permit process, it also must forfeit the flexibility to impose permit exactions that *Nollan* and *Dolan* provide land-use agencies, and accept the general prohibition against uncompensated takings that existed prior to *Nollan*.

Even if the holding in *Nollan* and *Dolan* could be parsed to give the District unbridled power to confiscate property in the permit process, the potential for government abuse of permit applicants would be limitless. As the *Nollan* Court observed, "[o]ne would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions." *Nollan*, 483 U.S. at 837 n.5. In a world with no unconstitutional conditions doctrine, the government could prohibit a property owner's use unless and until he paid a handsome sum into its coffers; that is the world the Florida Supreme Court endorsed in this case, when it upheld as constitutional the District's decision to withhold permits until Mr. Koontz agreed to finance improvements to its land. A Florida permit applicant now faces the prospect that each of the multiple land-use and environmental agencies with permit jurisdiction will require him to dedicate money to a public project or finance burdensome improvements to public property—with no end in sight. J.A. 76 (citing other land-use permitting authorities with jurisdiction over the property).

In the wake of *Nollan* and *Dolan*, unlawful confiscations of real-property interests may have

become rarer. But in jurisdictions like Florida, where the limitations in *Nollan* and *Dolan* are applied *only* to exactions of real-property interests, other kinds of permit exactions—especially monetary exactions—have proliferated, because they escape meaningful judicial review. William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 Chi.-Kent L. Rev. 865, 881 (1991) (The author collected evidence that "many communities were using land use exactions to finance local expenditures that were only distantly related to the project that occasioned the exaction."); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 262 (2006) ("All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth."); Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 Minn. L. Rev. 459, 480 (2005) (book review) ("Over the past three decades, increasing numbers of local governments . . . have turned to new methods of financing public works projects, especially land use exactions and impact fees."). And, because tax increases are so politically unpopular, many states have turned to permit applicants for money and financing of public projects. Brad Charles, Comment, *Calling for a New Analytical Framework for Monetary Development Exactions: The "Substantial Excess" Test*, 22 T.M. Cooley L. Rev. 1, 2 (2005) ("[T]o deal with the cost of growth created by new development, about half of the states enacted an impact-fee statute, a type of development exaction, to give local governments authority to exact fees from developers for any type of development . . . ."); Rosenberg, *supra*, at 262 ("Residents now urge their

elected officials to adopt impact fees when the locality has not yet done so. Without having to face the opposition of future residents who do not currently live or vote in the locality, [municipalities] find impact fees an irresistible policy option.").

The District may argue, as the Florida Supreme Court concluded (Pet. Cert. App. A-19–A-21), that applying *Nollan* and *Dolan* to permit exactions like the one at issue here would eliminate the freedom and flexibility of the government and bring development to a "standstill." Not so. In those jurisdictions where *Nollan* and *Dolan* apply to *all* permit exactions—regardless of the timing of their imposition or the form of the property being demanded—neither the regulation of land use nor development has come to a grinding halt. Anne E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 103, 104, 142-43 (2001) (reporting findings from empirical studies about the impact of *Nollan* and *Dolan* on planners' ability to impose exactions, including the finding that "a very large percentage of municipal planners view the Supreme Court takings precedents favorably").

This is not surprising. *Nollan* and *Dolan* do not *ban* permit exactions; rather, they serve as a constitutional check against exactions that are unrelated or disproportionate to the impact of an applicant's use of his property. *Id.* at 105, 142-43 (a majority of land-use planners reported that *Nollan* and *Dolan* do not encroach on their planning discretion; the decisions provide "good planning practices"). Land-use agencies remain free to impose those permit exactions

that can survive *Nollan* and *Dolan* scrutiny. *Id.* at 120-25.

Even if it were a well-founded concern, "flexibility" cannot be an excuse for overriding applicants' constitutional rights to make reasonable use of land and to be compensated for confiscated property. As this Court observed in *Dolan*: "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Dolan*, 512 U.S. 374, 396 (internal citation omitted).

In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court considered the question of whether adherence to the Constitution might unduly reduce the flexibility of land-use agencies in the permit process. The Court made clear that the convenience of government must yield to constitutional demands:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.

Id. at 321.

The Court struck just the right balance in *Nollan* and *Dolan*, where it construed the Takings Clause as allowing land-use agencies to confiscate property in the permit process under limited circumstances. Those cases provide just the right amount of flexibility to those agencies, while preserving the rights of applicants. Adopting different standards for the different kinds of property confiscations that government may attempt to carry out in the permit process would ignore the doctrinal foundations of *Nollan* and *Dolan*, and be unworkable in its uncertainty and unpredictability. Importantly, it would undermine the constitutional rights protected by the Takings Clause of the Fifth Amendment—"as much a part of the Bill of Rights as the First Amendment or Fourth Amendment."

II

THE DISTRICT'S PERMIT EXACTION CANNOT ESCAPE THE *NOLLAN* AND *DOLAN* LIMITATIONS BASED ON ARBITRARY FACTORS LIKE THE TIMING OF THE EXACTION'S IMPOSITION OR THE PROPERTY SOUGHT TO BE CONFISCATED

A. *Nollan* and *Dolan* Apply Whenever the Government Conditions the Issuance of a Permit on the Applicant's Compliance with a Permit Exaction

The Florida Supreme Court held that *Nollan* and *Dolan* apply to permit exactions only when the government "actually issues the permit sought." Pet. Cert. App. A-19. The court based its holding on the

erroneous assumption that, in both *Nollan* and *Dolan*, "the regulatory entities *issued* the permits sought with the objected-to exactions imposed." Pet. Cert. App. A-18. The court's decision is based on a mistaken assumption about those precedents, and is contrary to the unconstitutional conditions doctrine.

1. *Nollan*, *Dolan*, and This Case All Involved Challenges to Permit Exactions Imposed Prior to Permit Issuance

Like the District, the land-use agencies in *Nollan* and *Dolan* did not issue any permits to the applicants. In *Nollan*, the California Coastal Commission issued a Notice of Intent to Issue Permit—in effect, an approval of the permit application, which stated that the Commission would issue the Nollans a coastal development permit only if they first dedicated an easement to the public.[3] *Nollan*, 483 U.S. at 828. The permit decision stated, in relevant part:

> *Prior to the issuance of the Coastal Development Permit*, the applicants shall record, in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject properties in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other."

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[3] Like many land-use agencies, the California Coastal Commission first decides to approve a permit application before actually issuing the permit. The approval sets forth the conditions that the applicant must satisfy before issuance of the permit.

Brief of Appellants at 5, *Nollan*, 483 U.S. 825 (No. 86-133), 1986 U.S. S Ct. Briefs LEXIS 1382, **10 (quoting Joint Appendix at 34, *Nollan*, 483 U.S. 825 (No. 86-133)); *see also United States v. Pink*, 315 U.S. 203, 216 (1942) (recognizing the propriety of "tak[ing] judicial notice of the record in this Court" in another case).

The Nollans challenged the constitutionality of the exaction without recording the deed. *Nollan*, 483 U.S. at 828-29. Thus, no property changed hands, and no permit was issued prior to this Court's review of the permit exaction—just as in Mr. Koontz's case. *Id.*

The same thing is true of *Dolan*. There, the city considered two land use applications: an application for a building permit and an application for a variance. *Dolan v. City of Tigard*, 854 P.2d 437, 438-39 (Ore. 1993). The city approved an agency recommendation that it deny the variance and that it condition issuance of the building permit upon Ms. Dolan first dedicating flood-plain and bicycle-path easements to the city:

> [*Prior to the issuance of building permits* t]he applicant shall dedicate to the City as greenway all portions of the site that fall within the 100-year floodplain [of Fanno Creek] (i.e. all portions of property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary.

Dolan, 20 Or. LUBA at 413, 1991 Ore. Land Use Bd. App. LEXIS 316, at *4 (emphasis added) (brackets in original). Like the Nollans and Mr. Koontz, Ms. Dolan challenged the constitutionality of the conditions without dedicating any property to the city and without an issued permit.

It is certainly true that Mr. Koontz's challenge to the District's exaction comes to this Court after *denial* of his permit applications, while the Nollans' and Ms. Dolan's challenges came to the Court after *approval* of their permit applications. But that is a distinction without a difference. In all three cases, the government required the permit applicant to dedicate property to public use before it would *issue* the permits. J.A. 70-71; *Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 379. Though it may have taken different forms, the constitutionally relevant threat was substantively identical in *Nollan*, *Dolan*, and this case: "Accept our permit exactions, or we will not issue you a permit."

Nollan and *Dolan* make clear that the relevant inquiry focuses on the substance of the government's action—specifically, whether the government has demanded that the permit applicant give up a constitutional right. The nexus and proportionality tests in *Nollan* and *Dolan* are intended to limit the government's ability to make such demands. *Nollan*, 483 U.S. at 827; *Dolan*, 512 U.S. at 377. And the constitutional violation occurs at the moment the government makes the unlawful demand of the permit applicant. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 390; *see also* Sullivan, *supra*, at 1421-22 (The unconstitutional conditions doctrine is violated "when government offers a benefit on condition that the recipient perform or forego [sic] an activity that a preferred constitutional right normally protects from government interference.").

2. The Unconstitutional Conditions Doctrine Applies to All Permit Exactions, Regardless of When They Are Imposed in the Permit Process

That *Nollan* and *Dolan* apply where a permit is denied specifically because of the applicant's refusal to accede to an excessive exaction is consistent with the unconstitutional conditions doctrine. *Lingle*, 544 U.S. at 547. The doctrine never has been limited to conditions attached to government approvals. *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963) (denial of unemployment benefits held unconstitutional where government required person to "violate a cardinal principle of her religious faith"); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (denial of tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine); *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 590, 593-94 (1926) (decision prohibiting use of public highways unless private carrier assumed the duties and burdens of a common carrier violated the unconstitutional conditions doctrine).

In *Perry v. Sindermann*, 408 U.S. 593 (1972), a state college denied a teacher re-employment after he publically criticized the college's policies. The teacher sued on grounds that the denial of employment violated his First Amendment speech rights. The college argued that, because the teacher had no right to re-employment, he had no viable claim under the First Amendment. The Court disagreed with the college, holding:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests*—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.

Id. at 597 (emphasis added) (quoting *Speiser*, 357 U.S. at 526).

Even prior to this Court's decisions in *Nollan* and *Dolan*, the lower courts commonly invalidated conditions whose rejection resulted in permit denials under the unconstitutional conditions doctrine. In *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), for example, the city demanded that landowners dedicate a portion of their land containing valuable geothermal wells as a condition of approval of a land-use permit necessary for the owners to build apartments on their land. *Id.* at 649-50 (*cited by Dolan*, 512 U.S. at 391, *and Nollan*, 483 U.S. at 839). The owners objected to the dedication and the city denied the application. *Watson*, 716 F.2d at 649-50.

The city claimed that the unconstitutional conditions doctrine did not apply where a permit application was denied and, therefore, no property had been taken. *Id.* at 650. The Ninth Circuit rejected the city's argument as "specious," noting that this Court had never drawn a distinction between a decision approving and a decision denying an application. *Id.* at 651-52. By demanding a dedication as a condition of approval, the city had forced the landowners to choose between using their property and giving up their right to be compensated for the geothermal wells. *Id.* In short, the city was "manipulating" its permitting authority "to exert leverage" on the owners to compel a dedication of the geothermal wells without compensation. *Id.* The Ninth Circuit explained that, "[w]hile governmental entities may negotiate agreements aggressively," the government "must stop short of imposing unconstitutional conditions." *Id.* Applying the doctrine, the court held that the city was prohibited from denying the permit on the basis that the owners would not dedicate property to the public. *Id.* at 654; *see also McKain v. Toledo City Plan Comm'n*, 270 N.E.2d 370, 374 (Ohio Ct. App. 1971) (denial of a permit based on failure to dedicate property that was not sufficiently related to the proposed development amounted to a confiscation of private property) (*cited by Dolan*, 512 U.S. 390 n.7)).

Since *Nollan*, lower courts have continued to apply the unconstitutional conditions doctrine where a permitting agency denies a land-use application based solely on a landowner's objection to an excessive exaction. In *Goss v. City of Little Rock*, 151 F.3d 861 (8th Cir. 1998), the city denied a re-zoning application because the landowner had objected to its demand that

he dedicate 22% of his land for the expansion of a highway—a condition that violated the "essential nexus" and "rough proportionality" limitations. *Id.* at 862. On appeal, the Eighth Circuit rejected the city's argument that *Nollan* and *Dolan* did not apply to permit denials, explaining that the distinction between a permit approval and a permit denial was a "mere technicality" where the landowner's objection to an unlawful exaction provided the sole basis for the city's decision. *Id.* at 864 n.2.

Indiana's court of appeals arrived at the same conclusion in *Jacobsville Developers East, LLC v. Warrick County*, 905 N.E.2d 1034 (Ind. Ct. App. 2009). There, the court held that, where a permit application is denied on the basis that the landowner would not accede to a condition, the owner has a cause of action for an excessive exaction; the owner does not have a cause of action for a general regulatory taking. *Id.* at 1040-41; *see also William J. Jones Ins. Trust v. Ft. Smith*, 731 F. Supp. 912, 914 (W.D. Ark. 1990) (enjoining city from demanding dedication of an easement as a precondition for permit approval where the easement violated the nexus rule).

Besides the Florida Supreme Court, the only lower court that has expressly refused to apply the "essential nexus" and "rough proportionality" limitations to exactions imposed prior to a permit denial is the California Court of Appeal. *Lambert v. City & County of San Francisco*, 57 Cal. App. 4th 1172 (Cal. Ct. App. 1997). In *Lambert*, owners of a hotel applied for a permit from the city to convert residential rooms into tourist rooms. The city denied the permit after they refused the city's demand to pay $600,000 in mitigation for the lost residential units. *Id.* at 1182

("[I]t is somewhat disturbing that San Francisco's concerns about congestion, parking and preservation of a neighborhood might have been overcome by payment of significant sum of money . . . ."); *id.* (Strankman, P.J., dissenting) ("[T]he [city] sought money from [the owners] as a condition to receiving the requested zoning permit and denied the permit when [they] failed to pay the City's price.").

The owners sued the city, challenging the constitutionality of the mitigation requirement under *Nollan* and *Dolan*. *Id.* at 1176. The trial and appellate courts ruled against the owners, on the same grounds that the Florida Supreme Court did in this case: Even though the city's permit denial may have been motivated by the owners' refusal to submit to its $600,000 demand, the courts concluded that, technically, no exaction had been imposed and no property taken, since the permit had been denied. *Id.* at 1182.

This Court denied the owners' petition for writ of certiorari, and the denial generated a three-Justice dissent. *Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000) (Scalia, J., dissenting from denial of cert.). While the denial of certiorari "imports no expression of opinion upon the merits of the case," the dissent is instructive. *Teague v. Lane*, 489 U.S. 288, 296 (1989). Joined by Justices Kennedy and Thomas, Justice Scalia rejected the distinction between permit denials and permit approvals, as a basis for applying *Nollan* and *Dolan*:

> [T]he court's refusal to apply *Nollan* and *Dolan* might rest on the distinction that it drew between the grant of a permit subject to

> an unlawful condition and the denial of a permit when an unconstitutional condition is not met. From one standpoint, of course, such a distinction makes no sense. The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process an "out-and-out plan of extortion." There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference.

Lambert, 529 U.S. at 1048 (citations omitted).

If a land-use agency imposes an exaction as a condition of obtaining permit approval, it still should have to establish the exaction's relationship to the impact of the proposed project. As the dissenting Justices in *Lambert* observed:

> When there is uncontested evidence of a demand for money or other property—and still assuming that denial of a permit because of failure to meet such a demand constitutes a taking—it should be up to the permitting authority to establish either (1) that the demand met the requirements of *Nollan* and *Dolan*, or (2) that denial would have ensued even if the demand had been met.

Id. at 1047-48.

The circumstances in *Lambert* mirror this case. There was uncontested evidence of a demand that Mr. Koontz dedicate his money to a public use—specifically, that he finance public improvements.

Pet. Cert. App. A-6; Pet. Cert. App. D-4. And there was uncontested evidence that the District's permit denial was based *solely* on Mr. Koontz's refusal to accede to that demand. J.A. 70-71. On these facts, the District's exaction required review under the unconstitutional conditions doctrine, as applied in *Nollan* and *Dolan*.

B. *Nollan* and *Dolan* Apply to All Permit Exactions, Regardless of the Form of the Property Interest the Government Seeks To Confiscate

The Florida Supreme Court held that *Nollan* and *Dolan* did not apply to the District's monetary exaction requiring Mr. Koontz to finance improvements to its lands. Pet. Cert. App. A-19. According to the court, those precedents apply only to exactions of interests in real property. *Id.* The court's holding ignores this Court's Takings Clause jurisprudence, and the logic and purpose of the unconstitutional conditions doctrine.

As discussed in Part I, the Takings Clause broadly protects "private property," not just interests in real property. Under *Nollan* and *Dolan*, the Takings Clause allows some uncompensated exactions of property in the permit process, but only if the exaction bears an "essential nexus" and "rough proportionality" to the adverse impact of the proposed land use. Since the Takings Clause makes no distinction among the different kinds of property that government may exact in the permit process, there is no reason why the limitations in *Nollan* and *Dolan* also should not apply with equal force to all property, both real and personal. The limitations must apply to whatever property the government exacts as a condition of issuing a permit.

Certainly, there is nothing in the language of *Nollan* or *Dolan* to the contrary. Neither decision confines the "essential nexus" and "rough proportionality" limitations to land dedications. And with good reason. The central question in *Nollan*—a question that goes to the heart of the unconstitutional conditions doctrine—was whether the Commission could do indirectly, through the permit process, what it could not do directly outside the permit process. *Nollan*, 483 U.S. at 834. If the Nollans had not applied for a permit, could the Commission simply have demanded that they waive their right to compensation for confiscation of an interest in their land? *Id.* at 831. The same question arises in *all* cases involving confiscations of property—regardless of the property's particular form.

Here, the question is: If Mr. Koontz had not been applying for a permit, could the District have demanded that he waive his right to compensation for the cost of making forced improvements to the District's property? Only the unconstitutional conditions doctrine can answer the question—and the answer is: "no." *See, e.g., id.* at 834 ("[R]equiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment," as applied to the Takings Clause); *Brown*, 538 U.S. at 235 (analogizing for purposes of the Takings Clause the government's confiscation of one's money interest in a bank account—"the private property of the owner of the principal"—to the taking of land).

Furthermore, the Florida court's conclusion that *Nollan* and *Dolan* apply only to real property exactions cannot be squared with this Court's grant of certiorari and remand in *Ehrlich v. City of Culver City*, 15 Cal.

App. 4th 1737, 1743 (Cal. Ct. App. 1993), *vacated and remanded*, 512 U.S. 1231 (1994). In *Ehrlich*, the owner of a private tennis club and recreational facility applied to Culver City for an amendment to a general plan, a zoning change, and amendment of the specific plan to allow replacement of the tennis club and recreational facility with a condominium complex. *Id.* The City approved the application conditioned upon the payment of certain monetary exactions, including a $280,000 fee to pay a portion of the cost of replacing the lost recreational facilities. *Id.*

The California appellate court rejected the property owner's challenge, holding that monetary exactions are not subject to heightened scrutiny under *Nollan*. *Id.* This Court granted certiorari, vacated the lower court's judgment, and remanded the case for consideration under *Dolan*. *Ehrlich*, 512 U.S. at 1231. On remand, the California Supreme Court held that the nexus and proportionality tests apply equally to exactions of real and personal property. *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996) ("[I]t matters little whether the local land use permit authority demands the actual *conveyance* of property or the *payment* of a monetary exaction."); *see also San Remo Hotel v. City & County of San Francisco*, 41 P.3d 87, 102 (Cal. 2002) ("Though the members of this court disagreed on various parts of the analysis, we unanimously held that this ad hoc monetary exaction *was* subject to *Nollan/Dolan* scrutiny."); *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620, 635 (Tex. 2004) (holding that there is no reason why "[monetary] exactions should be analyzed differently than dedications in determining whether there has been a taking").

Finally, applying *Nollan* and *Dolan* to *all* exactions of property, including Mr. Koontz's monetary exaction, serves the purpose behind those decisions. Exactions requiring the dedication of a property owner's money to a public use trigger the same concerns that this Court sought to address in *Nollan* and *Dolan*. Again, the purpose of the limitations set forth in *Nollan* and *Dolan* is to root out government attempts to circumvent the Takings Clause under cover of the permitting process. *Lambert*, 529 U.S. at 1048 (Scalia, Kennedy, and Thomas, JJ., dissenting) (quoting *Nollan*, 483 U.S. at 837). And it is to protect the property owner from being singled out to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

As with a compelled dedication of land, governments can just as easily use a monetary exaction to force a property owner to bear burdens that the public as a whole should shoulder. *Del Monte Dunes*, 526 U.S. at 704 (the "essential nexus" and "rough proportionality" limitations apply to "required dedications or exactions"). The form of an exaction offers no clues about the risk of abusive leveraging by government in the permitting process. Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1569 (2006) ("[W]e do not believe that the land-monetary distinction serves as an effective proxy for the likelihood that the government overreached in imposing an exaction."). "[B]oth types of exactions raise the possibility that the government may improperly leverage its police power in order to receive

benefits from the owner without paying compensation." *Id.*

Monetary exactions "pose an even greater threat of government abuse" if they are not made subject to heightened scrutiny. Jane C. Needleman, Note, *Exaction: Exploring Exactly When* Nollan *and* Dolan *Should Be Triggered*, 28 Cardozo L. Rev. 1563, 1582 (2006). Absent adequate judicial oversight, and given the fungibility of money, governments can exact fees from a property owner to finance a wide variety of public projects that benefit the entire community—even projects wholly unrelated to the impact of the proposed development. Fischel, *supra*, at 881 (reporting evidence that "many communities were using land use exactions to finance local expenditures that were only distantly related to the project that occasioned the exaction").

For example, assume a government agency wants a conservation easement over a permit applicant's land, and that a permit exaction of such an easement would have no relationship whatsoever to the impact of the applicant's project. If the agency is in a jurisdiction (like Florida) that narrowly applies the limitations in *Nollan* and *Dolan* only to real property exactions, then the agency will avoid the constitutional consequences of confiscating the easement by permit exaction. Instead, it will confiscate from the applicant a sum of money equal to the cost of condemning the easement by eminent domain, knowing that such a monetary exaction will escape the heightened scrutiny of *Nollan* and *Dolan*. Though the form of the exaction may differ, the applicant suffers the *same* constitutional injury: forced waiver of compensation for confiscated property.

The Florida Supreme Court erred when it held that the unconstitutional conditions doctrine applies only to required dedications of real property. The doctrine applies in *all* cases in which government demands the waiver of a constitutional right, including the right to compensation. Applying the doctrine in this way will ensure that the promise of the Takings Clause—that permit applicants will not be forced to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole"—will be realized. *Armstrong*, 364 U.S. at 49.

CONCLUSION

This case is controlled by *Nollan* and *Dolan*. These precedents construe the Takings Clause as allowing permitting agencies, like the District, *some* flexibility in land-use and environmental regulation—but no more than the Clause allows. The District was able to confiscate property as a condition of issuing Mr. Koontz's permits, but *only* if its demand bore an essential nexus and rough proportionality to the impact of his use for the land. Contrary to the Florida Supreme Court's decision, the District was not entitled to unfettered power to confiscate anything it wanted from Mr. Koontz, simply because its "take it or leave it" demand occurred prior to permit issuance, or because the target of its demand was Mr. Koontz's money, as opposed to an interest in his land. Such details are constitutionally irrelevant: The District denied him his permits because he refused to accede to its requirement that he finance unrelated, public improvements. This is not flexibility; it is extortion—a constitutional transgression that, in the absence of

Nollan and *Dolan* review, goes undetected and escapes legal redress.

For these reasons, the decision of the Florida Supreme Court should be reversed.

DATED: November, 2012.

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RESPONDENT'S BRIEF

No. 11-1447

IN THE

Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether, under the Just Compensation Clause, a landowner is entitled to compensation for the denial of a development permit where his land has not been physically invaded and retains economically viable uses, and where he has not been obligated to donate property or spend money.

2. Whether a condition of approving a development permit that would effectively require a landowner to spend money to satisfy a valid regulatory requirement constitutes a taking of the landowner's private property.

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IN THE

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ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

INTRODUCTION

Petitioner applied for permits from the St. Johns River Water Management District ("the District") to dredge and fill part of his property in the Econlockhatchee River Hydrologic Basin.[1] Petitioner acknowledged that his proposal would destroy more than three acres of wetlands in an area designated for special protection, so he proposed to preserve about 11 acres elsewhere on his property as mitigation for the environmental harm. Applying generally applicable criteria—the validity of which petitioner does not contest—

[1] This litigation was initiated by Coy Koontz, Sr. After his death, his son, Coy Koontz, Jr., carried forward the proceedings. For simplicity we refer to both as "petitioner."

the District concluded that the mitigation petitioner proposed would not offset the harm caused by his project enough to meet the permitting standards. The District therefore told petitioner that the permits could not be issued unless he modified the project or proposed additional or alternative mitigation. The District suggested several ways petitioner could meet the permitting requirements, including by enhancing other wetlands near his property. Petitioner, however, disagreed with the District's conclusions about the sufficiency of the mitigation he had proposed. He refused to modify his project or propose any other mitigation, and the District denied the permits.

Instead of appealing the permit denial, petitioner filed this inverse-condemnation action. He sought monetary compensation on the ground that the District's decision constituted a taking. But nothing was taken from petitioner when the permits were denied. Petitioner did not have to convey any property interest to the District or suffer any other invasion of his property. He spent no money, time, or labor performing any mitigation. Nor does petitioner argue here that he suffered any taking of the economically viable uses of his property under *Lucas* or *Penn Central*. Indeed, he stipulated that his suit did not "proceed[] upon a theory that the [permit denial] deprived [him] of all or substantially all economically beneficial or productive use of the subject property." JA 76. In short, he suffered no loss for which he is entitled to compensation.

Before this Court, petitioner now seeks compensation for a regulatory taking of his real property on the ground that the District's request for additional mitigation was not sufficiently tailored to a legitimate regulatory purpose under the "nexus" and "proportionality" test of *Nollan* and *Dolan*. This Court rejected that

means-ends approach to regulatory takings in *Lingle*, and it should not revive it here.

Even if one could seek compensation under *Nollan* and *Dolan* for some proposed conditions that were never accepted or imposed, such a claim must fail in this case. Contrary to petitioner's characterizations, the District never required him to perform any particular form of mitigation. Nor does the District's suggestion for mitigation that petitioner singles out—which would have required him to spend money to enhance wetlands within the same hydrologic basin—constitute a taking under this Court's decisions. In these circumstances, the Supreme Court of Florida correctly held that petitioner has no valid claim to just compensation under *Nollan* and *Dolan*.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). As noted in the brief in opposition (at 1, 11-14), petitioner did not raise federal claims in the Florida courts, but expressly reserved them. The Supreme Court of Florida, however, rephrased the question certified to it in terms of both the federal and state constitutions. Pet. App. A-1 to A-2.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Fifth and Fourteenth Amendments to the United States Constitution and relevant Florida statutes and regulations are reprinted in the Appendix to this brief.

STATEMENT

A. Statutory And Regulatory Background

1. In 1845, when Florida joined the Union, wetlands occupied more than 20 million acres of its territory. Dahl, U.S. Fish & Wildlife Serv., *Florida's Wetlands: An Update on Status and Trends 1985 to 1996*, at 7 (2005) ("*Florida's Wetlands*"). For decades, that number declined as wetlands were drained, dredged, filled, leveled, and flooded to accommodate Florida's growing population. Between the mid-1950s and mid-1970s, Florida lost approximately 72,000 acres of wetlands each year. *Id.* By the mid-1970s, only 11.3 million acres remained. Frayer & Hefner, U.S. Fish & Wildlife Serv., *Florida's Wetlands: Status and Trends, 1970's to 1980's*, at 2 (1991).

Florida responded by enacting several statutes to improve the management and protection of its water resources. The Water Resources Act of 1972 "declared [it] to be the policy of the legislature" that "water and related land resources" should be properly managed, conserved, and developed, and that "natural resources, fish and wildlife" should be preserved. 1972 Fla. Laws ch. 72-299, pt. I, § 2(2). The Act divided the State along hydrologic boundaries into five water management districts. *Id.* § 12. Respondent St. Johns River Water Management District, which covers almost all of northeast and east-central Florida, is one of these districts. Fla. Stat. § 373.069 (1993).

Among other things, the 1972 Act authorized each water management district to regulate the building or alteration of surface water management systems, including any "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state." 1972 Fla. Laws ch. 72-299, pt. IV,

§ 1(5) (codified as amended at Fla. Stat. § 373.403(5) (1993)). A permit was generally required for such construction, and a district was authorized to issue permits with "such reasonable conditions as [were] necessary to assure" that the construction would "not be harmful to the water resources of the district." *Id.* § 4(1) (codified as amended at Fla. Stat. § 373.413(1), (2) (1993)).

In 1984, Florida acted to strengthen and clarify the state's regulation of wetlands by enacting the Warren S. Henderson Wetlands Protection Act, 1984 Fla. Laws 203—the first Florida law specifically directed at preservation of wetlands. *See* Smallwood et al., *The Warren S. Henderson Wetlands Protection Act of 1984: A Primer*, 1 J. Land Use & Envtl. L. 211, 212-215 (1985). In the Henderson Act, the legislature found that the State's wetlands "perform economic and recreational functions that would be costly to replace should their vital character be lost," and that "the continued elimination or disturbance of wetlands in an uncontrolled manner will cause extensive damage to th[ose] economic and recreational values." 1984 Fla. Laws at 203. The legislature also declared the public policy of the State "to establish reasonable regulatory programs which provide for the preservation and protection of Florida's remaining wetlands to the greatest extent practicable, consistent with private property rights and the balancing of other state vital interests." *Id.* at 204.

The Henderson Act generally prohibited any person from "dredg[ing] or fill[ing] in, on, or over surface waters" without obtaining a permit from the Florida Department of Environmental Regulation ("DER") (now called the Department of Environmental Protection). 1984 Fla. Laws at 205. The applicant was required to provide "reasonable assurance" that water quality standards would be met and that the proposed

project was "not contrary to the public interest," as determined by balancing enumerated criteria. *Id.* If a permit application did not meet these criteria, the Henderson Act required the DER to explore possible modifications to the proposed project to minimize any adverse environmental impacts and measures to mitigate the remaining adverse effects. 1984 Fla. Laws at 208-209.

After the Henderson Act, the annual rate of wetlands loss fell to approximately 5,000 acres—an 81 percent decline from the peak rate of loss in the 1970s and early 1980s. *Florida's Wetlands* 8. Florida's wetlands nonetheless remain far diminished from their original extent. Of the original wetland area, only about 56 percent remained as of 1996. *Id.*

2. The property at issue in this case lies east of Orlando, within the Econlockhatchee River Hydrologic Basin, also known as the "Econ Basin." The Econ Basin was one of 50 drainage basins designated in the District at that time. JA Ex. 168-169.[2] Petitioner's property included wetlands and neighboring uplands that were part of a special Riparian Habitat Protection Zone within the Econ Basin, which the District established to serve as a buffer between wetlands and developed areas to protect the integrity of the wetlands and their dependent wildlife. *See* JA 73-74; Fla. Stat. §§ 373.413, 373.415 (1993) (authorizing districts to create protection zones); Fla. Admin. Code r. 40C-41.063(5)(d)1 (1994).

Because of the location and size of petitioner's proposed development, Florida law at the time required him to obtain two permits from the District for his pro-

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[2] Citations to "JA" refer to the volume captioned "Joint Appendix." Citations to "JA Ex." refer to the volume captioned "Joint Appendix Exhibits."

posed development. First, under rules implementing the 1972 Water Resources Act, petitioner had to obtain a Management and Storage of Surface Water ("MSSW") permit to undertake any "filling in, excavation in, or drainage of a wetland" in the Econ Basin. Fla. Admin. Code r. 40C-4.041(1), (2)(b)10 (1994). Second, under rules implementing the 1984 Henderson Act, he had to obtain a Wetlands Resource Management ("WRM") permit for any "dredging and filling conducted in, on, or over ... surface waters of the state." *Id.* r. 17-312.030(1) (1994).[3]

Despite variation in their technical terms, the criteria for the two permits were similar.[4] An applicant for a WRM permit had to provide "reasonable assurance" that the development would not violate water quality standards and would not be "contrary to the public interest." Fla. Admin. Code r. 17-312.080(1), (2) (1994). The public interest standard required the District to consider, among other things, whether a project would "adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats." Fla. Stat. § 373.414(1)(a)2 (1993). To

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[3] The District administered the WRM permit requirement under authority delegated by the DER. *See* Fla. Admin. Code r. 17-101.040(12)(a)3 (1994).

[4] In 1993, Florida consolidated the MSSW and WRM permits into a single authorization known as the Environmental Resource Permit ("ERP"). 1993 Fla. Laws ch. 93-213, § 19. When petitioner applied for the permits at issue here, the 1993 Act had taken effect. But the administrative rules implementing the 1993 Act did not take effect until 1995. Hence, petitioner was required to apply for two permits. Under the rules in effect since 1995, a development like petitioner's would require only one consolidated ERP permit instead. *See* Want, *Law of Wetlands Regulation* § 13:8 (West Supp. 2012) (ERP program "became effective on October 3, 1995").

obtain an MSSW permit, the applicant had to provide (as relevant here) "reasonable assurance" that "[w]etland functions w[ould] not be adversely affected" by the development. Fla. Admin. Code r. 40C-4.301(2)(a)7; *see id.* r. 40C-4.301(1), (2); Fla. Stat. § 373.413(1). Also under the MSSW rules, an applicant seeking to build within the Riparian Habitat Protection Zone had to provide "reasonable assurance" that the project would "not adversely affect the abundance, diversity, food sources or habitat ... of aquatic or wetland dependent species," Fla. Admin. Code r. 40C-41.063(5)(d)1, and to "demonstrate that the particular development ... [would] not have an adverse effect on the functions provided by the zone to aquatic or wetland dependent species," *id.* r. 40C-41.063(5)(d)4.

In reviewing applications for WRM and MSSW permits, the District was required to "consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the regulated activity." Fla. Stat. § 373.414(1)(b) (1993); *see also* Fla. Admin. Code r. 17-312.300(4) (under WRM rule, District was to "consider any mitigation proposed by a permit applicant in accordance with this rule"); *id.* r. 40C-41.063(5)(d)5 (1994) (under MSSW rule, District was to consider proposed mitigation "on a case-by-case basis" for development in Riparian Habitat Protection Zone). The goal of such mitigation was to facilitate the issuance of development permits by "offset[ting] adverse impacts" from a given project "to the point where no net adverse impacts [were] antic[i]pated" and the permit could be granted. JA Ex. 145 (1989 District pol-

icy memorandum); *see also* JA Ex. 108-118 (Applicant's Handbook).[5]

B. Petitioner's Permit Applications And The District's Response

1. In December 1993 and February 1994, petitioner applied to the District for WRM and MSSW permits to "[r]eclaim approximately 3.75 acres of wetlands" on his property "for future commercial development." JA Ex. 3 (permit application); *see also* JA Ex. 5-6, 32-33; JA 72-73. The parties stipulated before trial that, at the time the application was submitted, petitioner's proposal would have resulted in the destruction of 3.4 acres of wetlands and 0.3 acres of protected uplands within the Riparian Habitat Protection Zone. JA 74.

After petitioner submitted his applications, District staff met with him, visited his property, and reviewed his permit-application materials, including an environmental report. *See* JA Ex. 50, 87-88, 132; Liability Trial Tr. 18, 69 (Aug. 28-29, 2002). The District staff found that the land petitioner proposed to develop "provide[d] a diversity of habitat and food sources, and serve[d] as an important refuge for a variety of wildlife species." JA Ex. 85 (WRM Technical Staff Report); *see* JA Ex. 130 (MSSW Technical Staff Report). The proposed project, the staff found, "would displace natural wildlife habitat," "cause adverse impacts to the conservation of fish and wildlife," and "adversely affect[]" the

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[5] The Applicant's Handbook excerpted in the Joint Appendix contains the District's official guidelines for permit applicants as of the relevant time and was available to the public. The sections concerning wetland mitigation—§§ 16.1.3 through 16.1.6 (JA Ex. 108-117)—were incorporated by reference into the Florida Administrative Code. *See* Fla. Admin. Code r. 40C-4.091(1)(a) (1994).

"condition and relative value of functions being performed by" the affected wetlands. JA Ex. 87; *see* JA Ex. 84-87, 130-132. The staff therefore concluded that petitioner's applications did not provide reasonable assurances that the proposed development would not adversely affect wetland functions or the conservation of fish and wildlife habitat and, hence, without adequate mitigation or project modification, the permits could not be granted. JA Ex. 92, 135-136.

2. Under its administrative rules, the District could not "require[]" mitigation, but was obligated to "consider any mitigation *proposed by [the] permit applicant.*" Fla. Admin. Code r. 17-312.300(4) (1994) (emphasis added). The District evaluated mitigation proposals "on a case by case basis," considering the amount and quality of both the proposed mitigation and the affected wetlands. *Id.* r. 17-312.340 (1994) (WRM standards for evaluating proposed mitigation); *see* JA Ex. 104 (Applicant's Handbook).

Petitioner's proposal to "mitigate the damages" created by his proposed project was to "dedicat[e] ... development rights" on the remaining 11 acres of his property by placing it in a conservation easement. JA Ex. 5, 32 (permit applications); *see also* Pet. App. D-4; JA 57 (MSSW Final Order). That proposal would have yielded a 3:1 ratio of preserved-to-destroyed wetlands. As a member of the District's staff explained, "If you did that on every parcel of property that was proposed for development," Florida "would lose 25 percent of its wetlands." JA 42. Given that the State had "already lost half of [its] wetlands," such a mitigation proposal would have led to "an unacceptable cumulative loss of wetlands" (*id.*), contrary to the public policy of the State (*see supra* pp. 4-5).

Indeed, the District and the state Department of Environmental Regulation had long expressed a policy preference for the creation or enhancement of wetlands, rather than mere preservation, as mitigation for the destruction of other wetlands. *See* JA Ex. 78, 146-152. Wetland creation involves the excavation of upland areas to construct new wetlands. JA 125; JA Ex. 108. Wetland enhancement improves the ecological quality of an existing wetland by reversing adverse conditions that diminished the wetland's value and functions. JA 125-126; JA Ex. 108. Both methods add to the wetlands resources of a given region, thereby offsetting destruction of other wetlands. By contrast, wetland preservation—the form of mitigation petitioner proposed—does not actually offset the adverse impacts of wetland destruction, but simply limits the extent of the loss.[6] Nevertheless, in "unusual circumstances," the District would consider mitigation proposals that entailed the preservation of high-quality wetlands or uplands. JA Ex. 77-81, 152, 158-162; Fla. Admin. Code r. 17-312.370 (1994) (WRM rule discussing use restrictions and conservation easements as mitigation).

At the time petitioner applied for his permits, the District evaluated mitigation proposals based in part on the ratio between the extent of wetlands adversely affected by a project and the extent of wetlands that would be created, enhanced, or preserved. The ratios were established at the state level by the Florida Department of Environmental Regulation. *See* JA Ex. 81-82. These ratios were "general guidelines" that provid-

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[6] The final rule on compensatory mitigation recently promulgated by the federal Environmental Protection Agency and the U.S. Army Corps of Engineers reflects the same preference for creation or enhancement over preservation. *See* 33 C.F.R. § 332.3; *see also id.* § 332.2.

ed "considerable flexibility to the District to determine whether a specific mitigation plan [wa]s adequate" in light of the condition of the affected wetlands and the wetlands to be enhanced, created, or preserved. JA Ex. 156-157; *see also* JA Ex. 81-82.

For wetlands preservation, the guidelines suggested that the ratio of preserved-to-destroyed wetlands should be at least 10:1 for preservation of the "highest quality" wetlands. JA Ex. 81. In other words, the preservation of ten acres of high-quality wetlands could acceptably mitigate the destruction of one acre. A higher ratio was called for if the lands to be preserved were of lower quality. JA Ex. 82; *see* JA Ex. 154. If preservation were generally allowed on a 1:1 ratio, Florida would lose half of its remaining wetlands. Even a 10:1 ratio would result in the loss of over nine percent of remaining wetlands. But limiting the rate of wetland destruction to that extent advanced Florida's public policy to balance wetland protection with development.[7]

By comparison, the ratios for wetlands creation ranged from less than 1:1 up to 5:1. JA Ex. 81. Ratios at the higher end of that range accounted for the temporary loss of wetland habitat that occurs while the created wetland is in early stages and the risk that creation might be unsuccessful. JA Ex. 81, 110-111. For wetlands enhancement, ratios ranged from 4:1 to 20:1 "because the wetlands prior to enhancement were already providing some wetland functions and the enhancement only adds a certain percentage of increased usefulness." JA Ex. 81.

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[7] *Cf. Alliance for Legal Action* v. *U.S. Army Corps of Eng'rs*, 314 F. Supp. 2d 534, 552 (M.D.N.C. 2004) (EPA's Region 4 (Southeast) Compensatory Mitigation Policy suggested mitigation ratios in "a range of 10:1 to 60:1" for preservation of wetlands).

Under these guidelines, and based on the quality of the affected wetlands, District staff concluded that petitioner's mitigation proposal was inadequate to offset the adverse impacts that would result from his proposed development. JA Ex. 89-92 (WRM Technical Staff Report), 131-136 (MSSW Technical Staff Report).

3. Rather than simply deny the permits, District staff suggested several ways petitioner could change his proposal that would have reduced or offset the adverse impacts of his development. *See* JA Ex. 90-92, 132-135 (technical staff reports); *see also* JA 24-25 (hearing before the District Board); JA 47-50 (WRM Final Order); JA 57-60 (MSSW Final Order). Some of these suggestions involved modification of the design or scale of petitioner's proposed construction to limit the resulting environmental harm and reduce the amount of mitigation that would have been required.

- District staff suggested that, instead of filling part of the site to construct a dry-bottom retention/detention pond, petitioner could employ a subsurface stormwater management system. JA Ex. 87-88, 132-133.
- The staff also suggested eliminating the proposed filling of side-slope areas and replacing them with stem walls. JA Ex. 88, 133.
- They also suggested that petitioner reduce the scale of his proposed project to one acre and preserve the rest of his land by conservation easement or deed restriction, in which case his preservation proposal would provide sufficient

mitigation and the permits could be granted. JA Ex. 91-92, 134-135; *see also* JA 47, 49, 57-58, 60.[8]

Petitioner rejected each of these options to modify his proposed development to reduce its adverse impacts. JA Ex. 88, 89, 132, 133.

The District also suggested alternatives for mitigation on other property within the Econ Basin—in lieu of, not in addition to, petitioner's proposed on-site preservation option—that would have been sufficient for petitioner to obtain the permits. *See* JA Ex. 90, 133; JA 47-48, 58-59. As "example[s]," District staff identified two properties on District land where off-site wetland enhancement "options" were available. JA Ex. 90, 133; *see also* JA 24.

- The District suggested that petitioner could improve the wetland functions on the Hal Scott Preserve by replacing approximately 15 inoperative or abandoned culverts or by plugging or eliminating the ditch system. JA Ex. 90, 133; *see also* JA 48, 59.
- The District suggested plugging or eliminating the ditch system on the Demetree Property. JA Ex. 90-91, 133-134; *see also* JA 48, 59.

The District did not limit off-site mitigation to its own land; equivalent mitigation on any property within the Econ Basin would have been sufficient. *See* JA Ex. 90-91, 133-134; JA 48-49, 59-60.

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[8] The Joint Pre-Trial Statement inadvertently stated that the suggested reduced development was 0.1 acre. *See* JA 74. It is undisputed that the correct number is one acre. *See* JA 49, 60; *see also* Pet. App. B-10 n.5, B-30.

As a further alternative, the District suggested that petitioner could achieve sufficient mitigation by combining his proposed on-site preservation with additional off-site enhancement of at least 50 acres of wetlands anywhere in the Econ Basin. JA Ex. 91, 134; JA 49, 60. The enhancement could have been done on either the Hal Scott or Demetree properties, or "[a] combination of enhancement activities on both of th[o]se example sites ... would also [have been] acceptable." *Id.* "Equivalent off-site enhancement options on other properties within the basin could also [have been] developed." JA Ex. 91, 134; *see* JA 49, 60. As a District employee explained at trial, petitioner could have enhanced 50 acres of wetlands on the Hal Scott Preserve simply by installing one culvert and removing another. JA 147. According to one contractor's estimate, the removal and installation of those two culverts would have cost approximately $10,000. JA Ex. 75-76; *see also* JA 120-122.

Petitioner rejected all of these suggestions. He was "unwilling to consider any additional mitigation options other than what [he] originally proposed." JA Ex. 90, 133; *see also* Pet. App. D-4. Indeed, when asked at a subsequent hearing whether he would "prefer [that] th[e] permit be turned down" or whether he would like to take "30 days and try to work it out," his agent responded that petitioner's "offer [was] as good as it can get." JA 41; *see also* JA 37-38.

In the absence of sufficient mitigation or modification, the District staff recommended that petitioner's permit applications be denied on the ground that his proposal would result in unacceptable harm to the environment. JA Ex. 92, 135-136. As explained in the written staff reports, the only mitigation petitioner had proposed was inadequate to offset the destruction that

his development would cause, and thus he had failed to provide reasonable assurance that his proposed development would not yield adverse wetland impacts contrary to the public interest. *Id.*

4. The District's governing board held a hearing to address the staff's recommendation. The principal subject of that hearing was whether the on-site mitigation petitioner had proposed in his permit applications was sufficient to warrant granting the permits. JA 21-43. Petitioner disputed the District staff's conclusions as to the quality of the wetlands that would be affected by the proposed development. And he argued that the District should have been satisfied with his proposal to conserve the remaining portion of his land. JA 34, 41.

After considering the applications and supporting material, the written staff reports, and the oral presentations of petitioner's agent and the District staff, the board voted to deny the permits. JA 43. On June 9, 1994, the District issued two final orders denying his permit applications. JA 44, 55. In each, the board concluded that petitioner had failed to provide reasonable assurance that his proposed development would not adversely affect the wetland functions provided by the property and would not conflict with the public interest. JA 51, 61-62. Each order further concluded that the mitigation plan petitioner had proposed was insufficient to allow issuance of the permit. JA 52, 62.

C. Judicial Proceedings

1. Petitioner had two options to contest the District's denial of his permit applications.[9] First, under

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[9] Petitioner actually could have had a third option before the board issued its final orders denying the permits. After the District staff notified him of its intent to recommend denial of his

the Florida Administrative Procedure Act, he could seek judicial review of the District's orders in the District Court of Appeal, an intermediate state appellate court. In that proceeding, petitioner could challenge the orders as inconsistent with a District rule or in violation of a constitutional or statutory provision—a process akin to petitioning for review of a final order of a federal agency before a federal court of appeals. *See* Fla. Stat. § 120.68(1), (6), (7) (1993). Second, petitioner could bring an inverse-condemnation action in the Circuit Court, a state trial court. Under the latter option, the trial court could not review whether the District's orders were correct under applicable statutes and rules. *See Key Haven Associated Enters., Inc.* v. *Bd. of Trs. of Internal Improvement Trust Fund*, 427 So. 2d 153, 159 (Fla. 1982). Instead, the court's review would be "confined solely to determining whether [the District's] action [was] an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla. Stat. § 373.617(2) (1993).[10]

Petitioner chose the inverse-condemnation option. In August 1994, he filed suit against the District in the Circuit Court for Orange County, Florida. As relevant here, he alleged that the District's orders denying permits for development of his property constituted a taking of his property for public use without compensation. JA 16. He sought an order "finding that the District

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permits, petitioner had 14 days to request a *de novo* hearing before an administrative law judge. *See* Fla. Stat. § 120.57 (1993). Petitioner did not pursue that option.

[10] Under certain circumstances, an aggrieved applicant can alternatively pursue an administrative appeal of a final District order before the state Land and Water Adjudicatory Commission, which can refer the matter for a hearing as needed. *See* Fla. Stat. § 373.114(1) (1993).

and [governing board] have taken the Plaintiff's property through regulatory action and are required to pay Plaintiff just compensation." JA 18.

After several trial and appellate court proceedings about ripeness, the case proceeded to a bench trial in August 2002. In the Joint Pre-Trial Statement, petitioner stipulated that he was "not proceeding upon a theory that the two District final orders deprived [him] of all or substantially all economically beneficial or productive use of the subject property." JA 76; *see also* JA 163 (conceding "there is still economical beneficial use on that property"). Rather, he argued that the District had "require[d] [him] to submit to excessive mitigation requirements and/or ratios to develop his property without evidence or proof that the required mitigation ratios advanced any substantial purpose." JA 69.

Petitioner's legal theory at trial rested heavily on *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), which indicated that land-use regulation could be a "taking" if the regulation failed to "substantially advance" a legitimate state interest. *See* JA 87, 147-148. Petitioner argued that the off-site mitigation the District allegedly "demanded" failed that test because, in his view, it was not supported by any evidence showing that the off-site mitigation would benefit wildlife or habitats on petitioner's own property. *See* JA 149, 150-151, 154, 155, 161-162, 164, 175. Petitioner referred as well to *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), arguing that *Dolan* had "changed the law" by shifting the burden to the government to prove that the permit decision advanced a legitimate purpose. JA 150; *see, e.g.*, JA 149, 150-151.

On October 30, 2002, the trial court ruled in petitioner's favor. The court began its analysis by noting that "Mr. Koontz's legal argument looks to *Agins*[]."

Pet. App. D-5. A taking could occur, the court explained, "if the governmental restrictions did not 'substantially advance a legitimate state interest.'" *Id.* The court also noted petitioner's reliance on *Dolan* and *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), but found those cases "clearly distinguishable in fact and legal principle" because petitioner was "not being asked to give up his right to exclude others" and "[n]either the government nor anybody else is going to occupy the property." Pet. App. D-6 to D-8. The court nonetheless inferred from a footnote in the District Court of Appeal's prior decision on ripeness that the appellate court intended *Nollan* and *Dolan* to "provid[e] [the] constitutional tests applicable to the Koontz property." *Id.* at D-9 to D-11.

Applying *Nollan* and *Dolan*, the trial court concluded that the District "did not prove the necessary relationship between the condition of off-site mitigation and the effect of development." Pet. App. D-11. It found no "showing of a nexus between the requi[r]ed off-site mitigation"—which the court defined as "enhancement of 50 off-site acres of wetlands by replacing culverts and plugging some ditches"—and the requested development. *Id.* at D-4, D-11. Nor did it find a showing of rough proportionality. *Id.* at D-11. In the court's view, the District's "required conditions of unspecified but substantial off-site mitigation" therefore "resulted in a regulatory taking of the Koontz property." *Id.* at D-1, D-4.[11] The court did not address the le-

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[11] The court made no finding on the cost of off-site mitigation. It noted that the mitigation could cost "as little as $10,000.00" or "between $90,000.00 and $150,000,00." *Id.* at D-4. Undisputed evidence showed that one of the District's mitigation suggestions—off-site enhancement of 50 acres of wetlands combined with petitioner's proposed preservation of 11 acres of his own property—

gality of any of the District's other mitigation suggestions, including the suggestions that petitioner reduce the size of his development to one acre or modify the design of the proposed development.

2. Under Florida law, the District had several remedial options: (1) it could decide to issue the permits; (2) it could otherwise modify its decision to "avoid an unreasonable exercise of the police power"; or (3) it could agree to pay damages as just compensation. Fla. Stat. § 373.617(3) (1993). In light of the significant deterioration of the quality of the wetlands on petitioner's property that had occurred in the eight years since he applied for permits (*see* JA Ex. 68; R. 1028, 1031-1032), the District elected to issue the permits, with the only mitigation being the on-site preservation that petitioner had originally proposed. JA 183.[12]

On June 18, 2004, the trial court approved the issuance of the permits. JA 183. The court found that the "issuance of the permit for which Koontz originally proposed the preservation mitigation" was a "reasonable exercise of police power that does not constitute a taking without just compensation." *Id.* Subject to appeal of the takings issue, the court reserved jurisdiction to determine damages for a temporary taking. *Id.* On December 12, 2005, after further proceedings not relevant here, the District issued the permits. Pet. App. C-2.

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could have been satisfied by installing one culvert and removing another for approximately $10,000. *See supra* p. 15. The $90,000-$150,000 range reflected the potential cost of the District's alternative suggestion that, *in lieu of preserving* the 11 acres, petitioner could replace approximately 15 culverts on the Hal Scott property. *See* JA 123.

[12] "R." refers to the record on appeal before the state courts.

On February 21, 2006, the trial court awarded petitioner $327,500 plus interest as "just compensation for the temporary taking" of his real property from the date the permits were initially denied to the date they were ultimately issued. Pet. App. C-1; *see id.* at C-2. The court based that amount on the methodology adopted by petitioner's appraisal expert (*id.*), who calculated the damages as the present value of the lost annual rents on the property from 1994 to 2005. R. 1442-1443 (Damages Trial Tr. 11-12).

3. The District appealed, arguing (among other things) that petitioner's theory under *Agins* did not survive *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 532 (2005), which disapproved the "substantially advance" language in *Agins* as a valid test for a taking. The District also argued that the trial court's decision could not be sustained on an alternative land-use exaction theory.

The Court of Appeal affirmed the trial court's liability judgment. *See* Pet. App. B-1 to B-30. Omitting any reference to *Agins* or *Lingle*, the majority relied on *Nollan* and *Dolan* and agreed with the trial court that the District had temporarily taken petitioner's real property. *See id.* at B-8 to B-10.[13]

Judge Griffin dissented. Noting that petitioner's "original theory of liability" under *Agins* had "evaporated" with *Lingle* (Pet. App. B-18 to B-19), she agreed

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[13] The majority acknowledged that the trial court had not addressed the legality of the District's other mitigation suggestions. Pet. App. B-10 n.5. It nonetheless concluded that the trial court had "implicitly rejected this contention" by "decid[ing] as fact that the conservation easement offered by Mr. Koontz was enough and that any more [mitigation] would exceed the rough proportionality threshold." *Id.*

with the District that there had been no taking under *Nollan* and *Dolan* (*id.* at B-19 to B-30). Judge Griffin reasoned that, although petitioner could have appealed the permit denial or mitigation conditions as invalid, he was not entitled to receive compensation when "*nothing* was ever taken." *Id.* at B-23. Moreover, Judge Griffin argued that where an unconstitutional condition does not involve the taking of an interest in land, the remedy of inverse condemnation is not available. *Id.* at B-22. Finally, she noted that "land-use exaction theory only appears to apply in circumstances where the property owner is faced with a choice between an exaction and permit denial." *Id.* at B-30. Here, she pointed out, petitioner "was never in that position because he had a third option—modification of his development to one acre with no 'exaction.'" *Id.*

4. The appellate court granted the District's motion for certification to the Florida Supreme Court. After reframing the certified question as involving both state and federal law, the Florida Supreme Court reversed. *See* Pet. App. A-1, A-3.

The Florida Supreme Court held that *Nollan* and *Dolan* apply "only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed." Pet. App. A-19. The court explained that "[i]f a property owner is authorized to file an inverse condemnation claim on the basis of the exactions theory any time regulatory negotiations are not successful and a permit is denied," land-use regulation could become "prohibitively expensive," and regulators would "simply deny permits outright without discussion or negotiation

rather than risk the crushing costs of litigation." *Id.* at A-20. The court further observed that "because St. Johns did not issue permits, Mr. Koontz never expended any funds towards the performance of off-site mitigation, and nothing was ever taken" from him. *Id.* at A-21. Justice Polston and Chief Justice Canady concurred in the judgment, agreeing with the District that petitioner's claim was in reality an attack on the propriety of agency action, which petitioner was required to exhaust in administrative remedies before bringing a regulatory takings action. *Id.* at A-22.

SUMMARY OF ARGUMENT

This is an inverse-condemnation case—a proceeding in which a landowner claims entitlement, as a constitutional matter, to just compensation because the government has taken his private property. A fundamental prerequisite of that claim is that the government has in fact taken property, either directly or through burdensome regulatory measures. Petitioner, however, seeks compensation where the government has not taken any of his property. No decision of this Court supports a claim of compensation where the government has taken no property.

This Court's decisions in *Nollan* and *Dolan* set forth important constitutional limits on the government's ability to demand that a landowner surrender private property rights as a condition of obtaining a development permit. Unlike the plaintiffs in *Nollan* and *Dolan*, however, petitioner did not ask the Florida courts to direct the District to purge the alleged unconstitutional conditions from the permits he sought. Instead, he declined to accept any additional mitigation options, the permits were denied, and he sought compensation. But because no permit was ever approved,

petitioner was never required to give up any property interest and never spent any money to comply with any "condition." The District thus never imposed any "exaction," within the meaning of *Nollan* and *Dolan*, for which compensation could be required.

Moreover, contrary to petitioner's contention, *Nollan* and *Dolan* do not establish another measure—in addition to this Court's decisions in *Loretto*, *Lucas*, and *Penn Central*—for determining whether government has effected a regulatory taking of the real property the owner seeks to develop by denying issuance of a permit. As *Lingle* makes clear, *Nollan* and *Dolan* apply only in the specific situation where the government exacts a condition for approval of a permit that, if imposed outside the permitting process, would itself amount to a taking for which just compensation would be constitutionally required. In that situation, the government may avoid the obligation to pay compensation if the proposed condition has an "essential nexus" to the government's pursuit of a legitimate objective and is "roughly proportional" to the severity of the regulatory problem that the government seeks to resolve. The government's obligation to carry that burden makes sense where, as in *Nollan* and *Dolan*, the proposed condition would actually transfer a property interest from the landowner to the government.

By seeking compensation where nothing has been taken from him, however, petitioner seeks to use *Nollan* and *Dolan* (instead of *Lucas* or *Penn Central*) to establish a regulatory taking of his real property on the grounds that the District did not sufficiently justify its decision. This is no different than the approach to regulatory takings that courts used to follow under *Agins*—an approach this Court has soundly repudiated and should not revive.

Even if one could seek compensation under *Nollan* and *Dolan* for some proposed conditions that were never accepted or imposed, such a claim must fail in this case. Unlike the exactions imposed in *Nollan* and *Dolan*, which were classic interests in real property, the only "conditions" at issue here would not themselves have worked a taking of private property for which just compensation would be constitutionally required. The only condition on which the District insisted was that petitioner show that his development would not harm the wetland environment within the Econ Basin. That was not a taking of private property; it was a valid exercise of regulatory authority. To the District, it was irrelevant whether petitioner modified his project to lessen its adverse impacts or whether he offset those impacts through mitigation, and it was irrelevant whether any mitigation was to take place on petitioner's property, off that site, or on a combination of both. The choice was petitioner's, so long as the mitigation was sufficient for the project as a whole to comply with environmental standards. Nor can petitioner establish that the off-site mitigation would have been a taking because it would have required him to spend money. This Court has never held that requiring a person to comply with a regulation constitutes a taking merely because the person must spent money in order to do so. Such a holding could dramatically extend the just compensation requirement into previously uncharted areas.

ARGUMENT

I. AN APPLICANT WHOSE LAND-USE PERMIT IS DENIED IS NOT ENTITLED TO COMPENSATION UNDER *NOLLAN* AND *DOLAN* FOR A CONDITION THAT WAS NEVER IMPOSED

The Just Compensation Clause obligates the government to pay compensation when it "take[s]" "private property ... for public use." U.S. Const. amend. V. In recognition of "the nearly infinite variety of ways in which government actions or regulations can affect property interests," this Court has repeatedly declined to set a "magic formula" for "a court to judge, in every case, whether a given government interference with property is a taking." *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012). Instead, the Court has employed several metrics to determine whether a governmental regulation "goes too far" and amounts to a taking of private property. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

The Court has recognized two categories of regulatory action as *per se* takings. A regulation that compels a landowner to suffer any physical invasion of his real property—regardless of the scope of the invasion—is a *per se* taking. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). So too is a regulation that deprives a landowner of all economically beneficial use of his real property. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

Where neither of these categorical rules applies, a landowner may establish that governmental regulation works a compensable taking of his property under the "essentially ad hoc, factual inquiries" set forth in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978). The *Penn Central* formula exam-

ines "[t]he economic impact of the regulation on the claimant," especially "the extent to which the regulation has interfered with distinct investment-backed expectations" and "the character of the governmental action." *Id.* at 124 (internal quotation marks omitted). These factors are the "principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

In addition, this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), provide a particularized framework for the "special context of land-use exactions." *Lingle*, 544 U.S. at 538. Those decisions "involve a special application of the doctrine of unconstitutional conditions, which provides that the government may not require a person to give up a constitutional right—here the right to receive just compensation where property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." *Id.* at 547 (internal quotation marks omitted); *accord Dolan*, 512 U.S. at 385.

Nollan and *Dolan* apply where the government has exacted a condition that, if imposed outside the context of a permitting decision, would itself constitute a *per se* physical taking requiring just compensation. *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831; *see Lingle*, 544 U.S. at 546-547. A land-use agency may insist on such a condition for granting a permit without paying just compensation if it can establish that the condition has an "essential nexus," *Nollan*, 483 U.S. at 837, to the government's legitimate interest in regulating the land's use and bears a "rough proportionality" to the impact of the proposed use, *Dolan*, 512 U.S. at 391.

Nollan and *Dolan* thus provide a framework under which a landowner may "challenge[] ... [an] adjudicative land-use exaction[]" on the ground that the exaction demanded amounts to an unconstitutional condition—*i.e.*, an uncompensated taking that bears an insufficient connection to the legitimate state interest underlying the land-use regulation. *Lingle*, 544 U.S. at 546.

A. Petitioner Cannot Obtain Compensation For Property That Was Never Taken

Unlike Mr. and Ms. Nollan and Ms. Dolan, petitioner does not "challenge" any land-use exaction at all. His suit seeks not to invalidate an unconstitutional condition, but to obtain just compensation for a taking of his property. Petitioner argues that the applicability of *Nollan* and *Dolan* does not "depend upon *when* in the permit process the exaction is imposed." Pet. Br. 13. But whether or not the timing is relevant when a landowner seeks to *invalidate* an unconstitutional condition, it most certainly does matter when the landowner instead seeks *compensation*. A landowner cannot obtain compensation under *Nollan* and *Dolan* for an exaction that has not been imposed.

The standard measure of just compensation for a taking of private property by the government is the amount of the owner's loss. *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 235 (2003); *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195 (1910). Thus, "[n]othing [is] recoverable as just compensation" where "nothing of value was taken from the [owner,] and it was not subjected by the Government to pecuniary loss." *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U.S. 280, 282 (1926).

Here, petitioner never lost any property as a result of the District's alleged "demand" that he perform off-site mitigation. Petitioner never agreed to do any off-site mitigation. He never spent a penny on public improvements or off-site mitigation or any other efforts to comply with any condition on the use of the land. He was never ousted from his land. He never lost the right to exclude others from it. Accordingly, petitioner did not have any property taken from him that would be compensable under *Nollan* and *Dolan*. The District cannot owe petitioner compensation for property he never lost.

Petitioner's claim for compensation differs markedly from what the petitioners in *Nollan* and *Dolan* did. In those cases, the landowners sought to purge unconstitutional conditions on their land-use permits through judicial review of the permitting decision. Instead of compensation, those actions sought to prevent imposition of the challenged condition. The Nollans, for example, "filed a supplemental petition for a writ of administrative mandamus" asking the court "to invalidate the access condition." 483 U.S. at 829. Similarly, Ms. Dolan "appealed to the Land Use Board of Appeals" from the commission's denial of her request for variances from the permitting standards "on the ground that the city's dedication requirements ... constituted an uncompensated taking of her property." 512 U.S. at 380, 382.

If petitioner had a valid objection to the District's permit denial decision, he too could have raised that objection through the administrative process or on direct judicial review of the District's final orders. *See supra* pp. 16-17. Under Florida law, the appellate court is the "proper forum to resolve" a "claim that an agency has *applied* a ... statute or rule in such a way that the ag-

grieved party's constitutional rights have been violated." *Key Haven Associated Enters., Inc.* v. *Board of Trs. of Internal Improvement Trust Fund*, 427 So. 2d 153, 158 (Fla. 1982). The appellate court could have "declare[d] the agency action improper and [could have] require[d] any modifications in the administrative decision-making process necessary to render the final agency order constitutional." *Id.*; *see also Paradyne Corp.* v. *State*, 528 So. 2d 921, 926-927 (Fla. Dist. Ct. App. 1988) (invalidating permit condition under *Nollan* on appeal from agency final order).

To be sure, had petitioner pursued that avenue, the District would have argued there as well that his claim lacked merit. As discussed below, *see infra* Part II, the District did not exact any condition at all. It suggested several ways in which petitioner could have satisfied the statutory and regulatory standards for permit eligibility. Petitioner refused them all. The District's denial of a permit in such circumstances cannot give rise to a claim under *Nollan* and *Dolan*, even if it were brought in the proper forum and sought the proper remedy. But in any event, petitioner is clearly not entitled to compensation where he gave up no property interest. This Court's cases nowhere suggest that compensation is required where a landowner has not been deprived of a property right.[14]

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[14] Petitioner's reliance (Br. 36-39) on the opinion dissenting from denial of certiorari in *Lambert* v. *City & County of San Francisco*, 529 U.S. 1045 (2000) (mem.), is misplaced. As in *Nollan* and *Dolan*, the petitioner in *Lambert* sought to invalidate the allegedly unconstitutional permit condition. *Id.* at 1045-1046 (Scalia, J., dissenting). Moreover—as portions of the opinion that petitioner does not quote make clear—the *Lambert* dissent confirms that *Nollan* and *Dolan* do not readily apply where a permit has been denied. The dissenting Justices acknowledged that "the subject of

B. *Nollan* And *Dolan* Do Not Provide The Standard For Showing A Regulatory Taking Of Petitioner's Property

By seeking just compensation under *Nollan* and *Dolan* where the demanded exaction was never actually imposed, petitioner effectively seeks to convert *Nollan* and *Dolan* into an *Agins*-style test for determining whether a landowner is entitled to compensation for a regulatory taking of property. This Court soundly rejected that approach to regulatory takings in *Lingle*.

1. Petitioner seeks compensation for a regulatory taking of his real property under a novel application of the "nexus" and "proportionality" standard

"Land-use regulations are ubiquitous," this Court has recognized, "and most of them impact property values." *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002). But "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415. Thus, a landowner whose permit application is denied because he refuses to accede to a proposed condition may of course contend that the burdens imposed on the use of his land as a result of the denial are so onerous that he is constitutionally entitled to compensation. *See Lucas*, 505 U.S. at 1019; *Penn Central*, 438 U.S. at 124; *see also Nollan*, 483 U.S.

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any supposed taking in [such a] case is far from clear" because "there is neither a taking nor a threatened taking of any money," and noted that reasoning was a "plausible" basis for denying the petitioner's claim. *Id.* at 1048. They dissented from the denial of certiorari only because they perceived *other* bases on which the state court might have denied relief that were worthy of plenary review. *Id.* at 1048-1049.

at 835-836 (noting that the Commission could "unquestionably" have denied the Nollans their permit outright unless the denial "would interfere so drastically with [their] use of their property as to constitute a taking" under *Penn Central*).

Here, petitioner claims to be entitled to the same relief that would be available under a successful *Penn Central* or *Lucas* claim: monetary compensation for a loss in the value of his land. But he seeks to substitute the stricter "nexus" and "proportionality" test of *Nollan* and *Dolan* in place of the *Lucas* and *Penn Central* standards the Court ordinarily applies in regulatory takings cases, which are more deferential to legitimate state regulation and place the burden on the claimant to show that the government's regulation "goes too far."

Before this Court, petitioner repeatedly contends that the "exaction" implicating *Nollan* and *Dolan* in this case was the alleged requirement that he pay for off-site mitigation on District-owned land. *See* Pet. Br. 11, 14, 15, 17, 23-24, 38, 40. It is little wonder that he does so, for in *Nollan* and *Dolan* it was the exactions themselves—the easements demanded as a condition of the permits—that would have constituted takings for which the government would have owed just compensation had they been imposed unilaterally.

But that is not the theory on which petitioner litigated his claim below. Petitioner did not seek, and the trial court did not award, damages having any relationship to the expected cost of performing off-site mitigation. Instead, petitioner sought and obtained damages for the impact that the permit denial allegedly had *on the rental value of his real property*—not for the amount or cost of the condition that the District supposedly demanded. The trial court found a "regulatory tak-

ing of the Koontz property" (Pet. App. D-1) and awarded damages in an amount representing lost rents that petitioner could have earned on the property itself had the permit been granted (Pet. App. C-2; R. 1442-1443).

Of course, petitioner could have sought precisely that relief under either *Lucas* or *Penn Central*. But he abandoned those claims in the state courts. In the Joint Pre-Trial Statement, petitioner specifically admitted that he was "not proceeding upon a theory that the two District final orders deprived [him] of all or substantially all economically beneficial or productive use of the subject property." JA 76; *see also* JA 163 (concession of petitioner's trial counsel that "there is still economical beneficial use on that property"); R. 1450-1451 (Damages Trial Tr. 19-20) (concession of petitioner's expert that property value appreciated).[15] In other words, petitioner chose not to pursue compensation for any type of regulatory taking that this Court has recognized. Instead, he pursued a compensation claim under the "nexus" and "proportionality" test that ordinarily applies to exactions under *Nollan* and *Dolan*. As dis-

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[15] The parties disputed in the Florida courts the precise contours of petitioner's stipulation that he was not deprived of "all *or substantially all*" economically beneficial or productive use of his property. JA 76 (emphasis added). Petitioner did not dispute that this stipulation was intended to foreclose a *Lucas* claim, but he contended that he retained a *Penn Central* claim. Pet. Fla. S. Ct. Br. 42-46. The District argued that petitioner's stipulation that he had not lost "substantially all" economic value of his property conceded a *Penn Central* claim as well. Resp. Fla. S. Ct. Br. 15 n.8. The Florida Supreme Court did not resolve that dispute, as it limited its review only to the availability of a *Nollan-Dolan* claim on these facts. Pet. App. A-21. Accordingly, if this Court affirms the Florida Supreme Court's decision that a *Nollan-Dolan* claim is not available here, petitioner could still pursue his *Penn Central* claim unless the Florida courts determine that he waived it.

cussed below, this Court's decisions do not support that expansion of *Nollan* and *Dolan* into a new category of regulatory taking.

2. Allowing compensation for a regulatory taking under the *Nollan-Dolan* standard would improperly revive *Agins*

Petitioner's attempt to substitute the *Nollan* and *Dolan* standard for those that this Court has repeatedly applied under *Loretto*, *Lucas*, and *Penn Central* would wrench the special rules of *Nollan* and *Dolan* from their proper context and would sever the constitutional link between the requirement of just compensation and the existence of an actual taking of property. In effect, it would revive the "substantially advance" theory of *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980). But as this Court recognized in repudiating *Agins*, the kind of means-ends inquiry the trial court applied here in upholding petitioner's takings claim under the "nexus" and "proportionality" standard is not a proper metric for determining whether government regulation is so burdensome as to constitute a taking. *See Lingle*, 544 U.S. at 542.

The Court's frameworks for deciding whether regulatory action results in a taking of property—*Loretto*, *Lucas*, and *Penn Central*—"share a common touchstone." *Lingle*, 544 U.S. at 539. Each "focuses ... upon the severity of the burden that government imposes upon private property rights," so as "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id.* The "substantially advances" test of *Agins*, in contrast, focused not on the burden of regulation on private property rights, but on the degree of fit

between regulatory means and ends. Although that test might have "ha[d] some logic in the context of a due process challenge," it is "not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." *Id.* at 542.

Like the *Agins* test, the "nexus" and "proportionality" standard of *Nollan* and *Dolan* "reveals nothing about the *magnitude or character of the burden*" imposed on private property rights by a particular permitting decision. *Lingle*, 544 U.S. at 542. *Nollan* and *Dolan* nonetheless survived *Lingle* because both cases "involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings." *Id.* at 547. In *Nollan*, the state agency required the owner to dedicate an easement allowing the public to traverse the owner's beachfront property. 483 U.S. at 828. Had the state simply required an easement for public access, the Court "ha[d] no doubt there would have been a taking." *Id.* at 831. Likewise, in *Dolan*, the city required the landowner to dedicate a portion of her real property to a "greenway" that would include a bike and pedestrian path for the public. 512 U.S. at 379-380. The issue in *Nollan* and *Dolan* was not whether the government's condition had the character of a taking; "[w]ithout question," the Court noted, "a taking would have occurred" had the government simply required the landowner to dedicate an easement for public use. *Id.* at 384.

Rather, *Nollan* and *Dolan* examined the connection between legislative means and ends for a different purpose entirely: to decide whether a condition that would require compensation if imposed independently was sufficiently related to a legitimate goal of land-use regulation that the government need not pay for it. *See Lingle*, 544 U.S. at 546-547; *Dolan*, 512 U.S. at 385.

Nollan and *Dolan* thus placed the burden on the government to establish that the conditions imposed for approving the permit were appropriately connected to the government's legitimate regulatory objectives. They did so, however, only because the conditions demanded by the government would have actually transferred a property right from the landowner to the public. Where the government actually insists on such a transfer as a condition of granting a permit, without paying compensation, it is appropriate to require that the government justify its action.

Here, however, petitioner seeks something quite different. He insists that the District justify under the "nexus" and "proportionality" standard its enforcement of the requirement that he engage in mitigation, even though no exaction was ever imposed and petitioner suffered no loss of his property rights at all. In effect, petitioner is seeking to use the Just Compensation Clause to challenge the validity of the government's application of its regulatory framework to his property. Indeed, he rested his theory of the case at trial on *Agins*, arguing that the central issue for the court to determine was whether the District's enforcement of the mitigation requirement "substantially advanced any purpose." JA 147; *see supra* pp. 18-19. As this Court reaffirmed in *Lingle*, that is not the proper focus of the Just Compensation Clause.

Of course, petitioner could have brought a claim for compensation if the District's decision had required the physical invasion of the land, as in *Loretto*, or if it had eliminated all economically beneficial uses of the land, as in *Lucas*. He could also have argued that the District's denial of his permits was so onerous as to warrant compensation under *Penn Central*. Moreover, he was not limited to the Just Compensation Clause: he

could have challenged the District's decision as arbitrary or irrational under the Due Process Clause or the Equal Protection Clause (or state law) if it lacked any connection to a legitimate governmental objective. *See infra* pp. 50-51. But where a landowner challenges the validity of a proposed condition in a rejected development permit as a taking, he cannot obtain compensation merely by showing that *if* the District had approved the permit, and *if* he had accepted the condition, that condition would have failed the nexus and proportionality standards of *Nollan* and *Dolan*. Such a claim would simply resurrect the rejected approach of *Agins*.

II. THE *NOLLAN-DOLAN* FRAMEWORK DOES NOT APPLY BECAUSE THE DISTRICT DID NOT IMPOSE A CONDITION THAT WOULD, ON ITS OWN, WORK A TAKING

Even if a landowner could invoke *Nollan* and *Dolan* to obtain compensation for expenses he never incurred to comply with a condition that was never actually imposed, petitioner's claim nonetheless would fail. *Nollan* and *Dolan* apply only where the government exacts a condition that would itself constitute a taking if imposed by the government unilaterally, outside the permitting context. The government's demand for the surrender of an easement, for example—a classic invasion of real property rights—unquestionably would have been a taking on its own. *See Lingle*, 544 U.S. at 546; *Dolan*, 415 U.S. at 384; *Nollan*, 483 U.S. at 831-832.

Here, the predicate for application of *Nollan* and *Dolan* is absent. The District did not demand that petitioner surrender any property right. In fact, the District did not impose any condition on petitioner at all. Rather, it adjudicated his permit applications under generally applicable and facially valid rules requiring an applicant to show that the proposed development

would not result in unacceptable adverse effects on the environment. The District did suggest various ways that petitioner could have altered his project to reduce the harm to wetlands or to offset the destruction of wetlands on his property by enhancing other wetlands within the same hydrological basin, so that his proposals would meet the regulatory standards—and petitioner could have proposed additional options to satisfy those standards. But he declined all of the District's suggestions and offered no other options of his own. Accordingly, the District's governing board denied his permits on the ground that petitioner had not provided reasonable assurances that his development would not have an adverse impact on wetlands within the Econ Basin.

The particular suggestion that petitioner singles out for attack—that he undertake mitigation activity on District property that would have cost him money—also would not have constituted a taking, even if the District actually *had* mandated it (which it did not). Petitioner therefore cannot establish the fundamental requirement of a *Nollan-Dolan* claim, for no condition attendant to the permit would itself have been a taking.

A. *Nollan* And *Dolan* Do Not Apply Where The Government Denies A Permit Without Demanding Any Particular Condition

1. The District never conditioned issuance of a permit on payment for off-site mitigation

Contrary to petitioner's submission, the District never "exacted" *any* condition—much less did it impose a specific obligation on him to finance projects to enhance wetlands on the District's property within the Econ Basin. Under the District's permitting standards (Fla. Stat. § 373.414(1)(b) (1993)), petitioner was re-

quired to provide reasonable assurance that his project would not adversely affect the functions of the wetland system. Where mitigation was necessary to meet that requirement, it was the applicant's obligation to propose the form that mitigation would take. As explained above, *see supra* p. 10, the District's rules did not permit it to *require* any form of mitigation. Rather, as petitioner stipulated, the District instead suggested several alternatives "to reduce and offset the adverse impacts" of his development to the wetlands system within the Econ Basin "so that the District could permit the proposed project." JA 74. When petitioner rejected all these suggestions and offered no acceptable alternatives of his own, the District denied the permit.

Petitioner's inverse-condemnation claim does not challenge the facial validity of Florida's requirement that landowners mitigate the adverse environmental impacts of development as a condition to obtaining a permit; nor does it challenge the facial validity of the standards the District applied to determine whether the mitigation he proposed was sufficient. Petitioner stipulated that his proposed development would have resulted in the destruction of 3.4 acres of wetlands and 0.3 acres of protected uplands. JA 74. All that the District required was that petitioner offset—in whatever way he chose—the adverse environmental impact of his project in a manner sufficient to comply with the applicable regulatory standards. *Cf. Dolan*, 512 U.S. at 394 (noting that "it would have been reasonable to require [Ms. Dolan] to provide some alternative greenway space for the public either on her property or elsewhere" if her proposal encroached on existing greenway space). Accordingly, the essential predicate of a *Nollan-Dolan* claim—a concrete exaction that could amount to a taking—is absent in this case.

2. *Nollan* and *Dolan* should not be extended to cases where no particular condition is demanded and a permit is denied

Had the District denied petitioner's permit applications outright, without suggesting any ways in which petitioner could qualify for approval, it clearly would not have imposed any "exaction" subject to *Nollan* and *Dolan*. Petitioner nonetheless contends that the District incurred liability under *Nollan* and *Dolan* by identifying possible ways he could have provided adequate mitigation. But unlike the agencies in *Nollan* and *Dolan*, the District did not demand that petitioner perform any particular form of mitigation or relinquish any property interest. Imposing liability for a taking in such a circumstance would work considerable damage to the flexible process by which landowners and permitting agencies negotiate permit conditions. As the Supreme Court of Florida noted, if the government could be held liable for an "exaction" taking merely because it suggested ways of complying with the permit requirements, then it would "simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation." Pet. App. A-20.

A rule allowing a *Nollan-Dolan* claim wherever an agency denies a permit without exacting any particular condition would also be difficult for courts to administer. As this case well shows, where a regulatory agency has merely suggested a range of ways an applicant may become eligible for a development permit, *Nollan* and *Dolan* make at best an uncomfortable fit. *See City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999) (noting that *Nollan* and *Dolan* are "not readily applicable" to the "denial of development" context). Without a final "deal" on the table between a landowner and a regulatory agency, it is unclear how

the "nexus" and "proportionality" standard would even apply. Under *Nollan* and *Dolan*, courts must scrutinize whether "the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. That test cannot be readily applied where there is no final "required dedication," but only a series of alternative proposals, none of which is ever insisted upon as the *sine qua non* of a permitting decision. To apply *Nollan* and *Dolan* in that context, a reviewing court would have to examine *each* of the potential options that the agency suggested to the applicant during the permitting process. If *any one* of those options satisfied the "nexus" and "proportionality" standard, then the agency's denial of the development permit would not be predicated on an unconstitutional condition.[16]

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[16] In this case, for example, the District suggested that petitioner reduce the scale of his development to one acre and dedicate his adjacent land to a conservation easement. The trial court never ruled whether that proposal satisfied the *Nollan-Dolan* standard. The District Court of Appeal suggested that the trial court "implicitly ... decided as fact that the conservation easement offered by Mr. Koontz was enough," and that requiring any further mitigation "would exceed the rough proportionality threshold, whether in the form of off-site mitigation or a greater easement dedication for conservation." Pet. App. B-10 n.5 (majority op.). That statement lacks support in the record. First, the trial court's order did not even mention, much less address, any of the other mitigation suggestions. Second, the difference between petitioner's conservation proposal and the District's suggestion for conservation was less than three acres. It is implausible that the trial court "implicitly" decided, without any analysis, that accepting petitioner's conservation proposal would satisfy this Court's rough proportionality standard but that the District's suggestion violated the Constitution. It is much more likely, as the dissent observed, that the trial court simply failed to analyze the legality of this (or any other) option. *See* Pet. App. B-30 (Griffin, J., dissenting).

The expansion of *Nollan* and *Dolan* that petitioner seeks thus threatens to embroil courts in extensive litigation over the conduct of negotiations between landowners and permitting agencies. Permitting frequently consists of an extended give-and-take as the parties seek a resolution that is satisfactory to both the developer and the community. *See* Fenster, *Failed Exactions*, 36 Vt. L. Rev. 623, 643 (2012). When negotiations fail and the result is a lawsuit, the parties are likely to dispute what conditions were actually suggested (and by which party), whether those conditions were proposed in good faith, and what the burden of those conditions would have been had they been finalized into a development permit. Adding this layer of factual complexity would only exacerbate the problem that "[c]ases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

The litigation of this case illustrates the problem. This was in many respects a run-of-the-mill permitting decision. District staff made findings that petitioner's proposed development would adversely affect wetland functions in the Econ Basin. They found that petitioner's proposed mitigation was insufficient to offset those adverse effects. As often may occur, petitioner disagreed with those conclusions. In the trial of petitioner's "takings" claim, the parties simply relitigated those issues in the guise of a claim for just compensation. Such litigation seems far removed from the focused inquiry that the Court anticipated in *Nollan* and *Dolan*. And, as the Supreme Court of Florida observed, allowing a claim under *Nollan* and *Dolan* every time negotiations fail and a permit is denied would threaten agencies with

"prohibitively expensive" litigation (Pet. App. A-20), which would constrain agency flexibility to the detriment of both the community and the landowner. Therefore, *Nollan* and *Dolan* should not be expanded to cases where the government denies a permit without ever imposing or requiring any condition.

B. Even If The District Had Required Petitioner To Spend Money To Offset Wetland Destruction, That "Condition" Would Not Have Been A Taking

Petitioner contends that the District refused to issue permits to him unless he paid for projects to enhance wetlands on the District's own property. That simply is not what happened. But even if it was, that "condition" still would not support a claim under *Nollan* and *Dolan* because it does not constitute a taking. Petitioner's theory is that conditioning the issuance of permits on his agreement to spend money performing off-site mitigation would be a taking of his money. As noted, that theory bears little resemblance to the "taking" of *real property* for which petitioner sought and received compensation in the trial court. *See supra* p. 21. But in any event, the mere requirement to spend money to satisfy a regulatory standard does not amount to a taking of private property.

1. Under *Eastern Enterprises*, a financial obligation is not a taking

Petitioner exclaims that the District demanded "[his] money or [his] land!" Pet. Br. 7. In fact, to the extent that any of the District's suggested methods of mitigation—which were not demands at all—involved any payment of money, they would have required only that petitioner pay a third-party contractor to carry out

the suggested mitigation. The District did not demand a monetary exaction from petitioner's pockets into the government's coffers. Especially in this circumstance, *Eastern Enterprises* makes clear that the "condition" to perform off-site mitigation would not have effected a taking.

In *Eastern Enterprises*, the Court considered whether a federal statute imposing retroactive liability on a coal company to fund lifetime benefits for retirees effected a taking. *See* 524 U.S. at 504 (plurality op.). Five Justices concluded that it did not, holding that the Just Compensation Clause does not apply to a requirement to spend fungible money. Justice Kennedy agreed with the plurality that the statute was unconstitutional, but his analysis relied on the Due Process Clause. *See id.* at 539-540 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy disagreed that a general financial liability is a taking. Specifically, he reasoned that the Court's regulatory takings jurisprudence has consistently been limited to government actions implicating "a specific property right or interest." *Id.* at 541. Although the statute at issue imposed a "staggering financial burden," Justice Kennedy wrote, it did not involve "an identified property interest." *Id.* It did not "appropriate, transfer, or encumber an estate in land ... , a valuable interest in an intangible ... , or even a bank account or accrued interest." *Id.* at 540. To the contrary, the statute "simply impose[d] an obligation to perform an act, the payment of benefits," and was "indifferent as to how the regulated entity elect[ed] to comply or the property it use[d] to do so." *Id.*

The four dissenting Justices—Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg—agreed with Justice Kennedy that takings analysis was

inapplicable. *See* 524 U.S. at 554-555 (Breyer, J., dissenting). They likewise reasoned that "[t]he 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property"—not "an ordinary liability to pay money." *Id.* at 554.

After *Eastern Enterprises*, the prevailing view among the federal courts of appeals is that a mere obligation to spend money is not a taking. *See, e.g.*, *West Va. CWP Fund* v. *Stacy*, 671 F.3d 378, 386-387 (4th Cir. 2011) (holding "that the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause" and noting that other circuits are in accord); *McCarthy* v. *City of Cleveland*, 626 F.3d 280, 286 (6th Cir. 2010) ("[T]he Takings Clause is not an appropriate vehicle to challenge the power of [a legislature] to impose a mere monetary obligation without regard to an identifiable property interest." (alterations in original; internal quotation marks omitted)); *Swisher Int'l, Inc.* v. *Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008) ("[T]he takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed by Congress merely to pay money."); *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) ("[T]he mere imposition of an obligation to pay money ... does not give rise to a claim under the Takings Clause[.]").

Even under petitioner's view, the alleged condition at issue here would have required him to do nothing more than spend money. The alleged condition "simply impose[d] an obligation to perform an act" that might have entailed the payment of funds, and the District was "indifferent" as to how petitioner "elect[ed] to comply" with that obligation "or the property [he] use[d] to do so," *Eastern Enters.*, 524 U.S. at 541 (Ken-

nedy, J., concurring in the judgment and dissenting in part); *accord id.* at 554-555 (Breyer, J., dissenting). Consequently, under the reasoning of a majority of Justices in *Eastern Enterprises*, even an actual obligation that petitioner spend money, had it been imposed, would not rise to a taking.

2. This Court's other decisions do not recognize an obligation to spend money to be a taking

Petitioner does not acknowledge (or even cite) *Eastern Enterprises*. Instead, he asserts without elaboration that "money" is property within the meaning of the Just Compensation Clause. Working from that faulty premise, and relying on this Court's decision in *Brown* v. *Legal Foundation of Washington*, 538 U.S. 216 (2003), he claims that imposing an obligation to spend money effects a taking of property.

Brown, however, has nothing to do with an obligation to spend money from general funds, which is what is at issue here. The specific property interest at stake there was the accrued interest on funds held in an IOLTA account by a lawyer on behalf of his clients. *See* 538 U.S. at 235; *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 170 (1998). The Court concluded that a State's seizure of that interest, a discrete asset, was analogous "to the occupation of a small amount of rooftop space in *Loretto*." *Brown*, 538 U.S. at 235; *see also Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163-164 (1980) (analogizing government seizure of interest accruing on funds placed in interpleader to an appropriation of private property).

The touchstone in *Brown*, as well as *Webb's Fabulous Pharmacies*, is a government burden that is functionally equivalent to an appropriation of real property.

Accord Lingle, 544 U.S. at 539. That touchstone is notably absent here. First, unlike in *Brown* or in *Webb's Fabulous Pharmacies*, the District never *seized* anything. Even accepting petitioner's theory of this case, the District at most required that he mitigate the impact on wetlands within the Econ Basin by *spending* money for mitigation projects within that Basin.[17]

Second, unlike the seizure of accrued interest, the imposition of monetary liability "is not, of course, a permanent physical occupation of ... property of the kind that [the Court] ha[s] viewed as a *per se* taking." *Eastern Enters.*, 524 U.S. at 530 (plurality op.) (citing *Loretto*, 458 U.S. at 441)). "Unlike real or personal property, money is fungible." *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989); *see McClung* v. *City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008) (relying on *Sperry* in rejecting argument that *Nollan* and *Dolan*

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[17] The Court's decision in *Village of Norwood* v. *Baker*, 172 U.S. 269 (1898), is not on point here. That case involved a special assessment that effected an uncompensated condemnation of real property. *See id.* at 274-278. The Village of Norwood condemned a strip of land for the purpose of constructing a road. *Id.* at 274-275. A jury awarded the landowner, Ellen Baker, $2,000 for the value of the condemned strip, and the village paid the full amount to Ms. Baker. *Id.* at 275. But the village then passed an ordinance providing that the full costs of the condemnation, including the compensation it had paid to her, were to be assessed on the "abutting property" owner—that is, Ms. Baker. *Id.* Consequently, the village assessed Ms. Baker "not only the full amount paid for the strip condemned, but [also] the cost and expenses of the condemnation proceedings[.]" *French* v. *Barber Asphalt Paving Co.*, 181 U.S. 324, 344 (1901). The Court plainly understood the village's action to be a remarkable effort to evade its just compensation obligation: the village physically took Ms. Baker's real property and then forced *her* to pay for the privilege. The Court thus rightly rejected the village's argument that its "act of confiscation" was "a valid exercise of the taxing power." *Id.*

apply to a "monetary exaction"). If a general financial liability were construed to be "a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance." *Sperry*, 493 U.S. at 63 n.9. "Such a rule," the Court cautioned, "would be an extravagant extension of *Loretto*." *Id.* This caution counsels strongly against recognizing the takings claim here as well.[18]

3. *Nollan* and *Dolan* should not be extended to reach conditions that merely require an applicant to spend money to satisfy regulatory standards

"As the range of governmental conduct subjected to takings analysis has expanded," this Court has "been careful not to lose sight of the importance of identifying the property allegedly taken, lest all governmental action be subjected to examination under the constitutional prohibition against taking without just compensation, with the attendant potential for money damages." *Eastern Enters.*, 524 U.S. at 543 (Kennedy, J., concurring in the judgment and dissenting in part). Expanding the application of *Nollan* and *Dolan* to reach conditions on the issuance of permits that merely require the expenditure of fungible money would expose a broad range of monetary obligations—application

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[18] None of the other authorities cited by petitioner provides any support for such an extravagant extension of *Loretto*. Petitioner cites the Court's "grant, vacate, and remand" (GVR) order in *Ehrlich* v. *City of Culver City*, 512 U.S. 1231 (1994) (mem.), for the proposition that *Nollan* and *Dolan* must apply to a monetary obligation. But the Court's GVR order was "not a 'final determination on the merits.'" *Tyler* v. *Cain*, 533 U.S. 656, 664 n.6 (2001). It was a means of allowing lower-court consideration of an intervening legal development: namely, the Court's decision in *Dolan*, issued three days earlier. *See Ehrlich*, 512 U.S. at 1231.

fees, usage fees, and so forth—to heightened scrutiny under *Nollan* and *Dolan*. Petitioner suggests no limiting principle that would prevent many other fees, assessments, and taxes imposed on a daily basis, for everything from obtaining a driver's license to traveling on a toll road or parking at a metered space, from being subjected to takings litigation. But that cannot be the law. *See, e.g.*, *Sperry*, 493 U.S. at 62 n.9; *Brown*, 538 U.S. at 243 n.2 (Scalia, J., dissenting) ("[T]axes and user fees ... are not takings[.]").

Nor does petitioner explain why his theory would not result in an exaction taking every time a permit applicant incurs costs to bring himself into compliance with a generally applicable regulatory standard. Many permitting standards require applicants to acquire new technologies to minimize harm to the environment or to undertake offsetting mitigation to compensate for expected harms from a proposed project. *See, e.g.*, 42 U.S.C. § 7475 (requiring, as part of the Clean Air Act's Prevention of Significant Deterioration permitting process, that new major emitting facilities in certain areas be constructed with "the best available control technology for each pollutant subject to regulation"). Permit applicants often must spend money to ensure that they satisfy those standards and that their development projects do not contravene public policy. For courts to impose heightened scrutiny under *Nollan* and *Dolan* merely because regulators have enforced those standards would mark a significant expansion of the scope of the Just Compensation Clause and of the Judiciary's power at the expense of the other branches.

Rejecting petitioner's claim for compensation under *Nollan* and *Dolan* would not mean that the government is free to impose monetary or other similar conditions on the issuance of land-use permits without

any constitutional restraint. Petitioner could have argued that the District's application of the regulatory framework so heavily burdened his right to use his property as to constitute a regulatory taking under *Lucas* or *Penn Central*. He might have argued that, in denying the permits, the District violated the Equal Protection Clause because it intentionally treated him differently from other similarly situated landowners with no rational basis. *See Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564-565 (2000). Or he might have contended that denial of the permits was arbitrary and irrational and therefore violated the Due Process Clause. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *Lingle*, 524 U.S. at 548 (Kennedy, J., concurring) ("[T]oday's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process."); *Eastern Enters.*, 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part) (expressing view that the statute in question "must be invalidated as contrary to essential due process principles"); *id.* at 556 (Breyer, J., dissenting) ("The question involved ... finds a natural home in the Due Process Clause[.]"). And landowners in petitioner's position might also have numerous claims arising under state law, including state constitutional protections for property rights, state takings analogues, and well-settled principles that state permitting agencies may not act in an arbitrary and capricious manner. *See, e.g.*, Fla. Stat. § 70.001 (providing a cause of action for "laws, regulations, and ordinances of the state and political entities in the state" that "may inordinately burden, restrict, or limit private property

rights without amounting to a taking under the State Constitution or the United States Constitution").[19]

Any of these approaches presents a means by which landowners can challenge permit denials based on refusals to accede to monetary or similar conditions without extending *Nollan* and *Dolan* to that context. Given the availability of these alternative remedies to a landowner in petitioner's position, there is no merit to petitioner's concern that his novel takings theory is necessary to protect landowners from oppressive permitting agencies.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

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[19] Petitioner's amici inveigh at length on what they allege to be examples of extortionate conditions demanded of property owners in other cases. These stories are based on, among other things, untested allegations in a complaint and assertions made in amicus briefs filed in other cases. *See, e.g.*, Br. of Ass'n of Fla. Cmty. Developers 10 & n.5 (example based solely on allegations in a complaint that was voluntarily dismissed). Such unverified claims should not be taken at face value and have no bearing here. Moreover, as discussed above, rejecting petitioner's theory of *Nollan* and *Dolan* does not foreclose judicial review of land-use regulation on other Just Compensation Clause grounds (such as *Lucas* or *Penn Central*) or on Due Process or Equal Protection Clause grounds, to say nothing of state-law grounds.

Respectfully submitted.

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APPENDICES

U.S. Const. amend. V

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1

... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Stat. § 120.57 (1993)—Decisions which affect substantial interests

The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless such proceedings are exempt pursuant to subsection (5). Unless waived by all parties, subsection (1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, subsection (2) applies in all other cases.

(1) FORMAL PROCEEDINGS.—

* * *

(b) In any case to which this subsection is applicable, the following procedures apply:

1. A request for a hearing shall be granted or denied within 15 days of receipt.

2. All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days; however, the 14-day notice requirement may be waived with the consent of all parties. ...

* * *

3. Except for any proceeding conducted as prescribed in s. 120.54(4) or s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency elects to request a hearing officer from the division, it shall so notify the division within 15 days of receipt of the petition or request. When the Florida Land and Water Adjudicatory Commission receives a notice of appeal pursuant to s. 380.07, the commission shall notify the division within 60 days of receipt of the notice of appeal if the commission elects to request the assignment of a hearing officer. In the request of any agency, the division shall assign a hearing officer with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to the formal proceeding, except as a party litigant, as long as the division has jurisdiction over the formal proceeding. Any party may request the disqualification of the hearing officer by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity.

4. All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to any order or hearing officer's recommended order, and to be represented by counsel. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut it.

* * *

6. The record in a case governed by this subsection shall consist only of:

a. All notices, pleadings, motions, and intermediate rulings;

b. Evidence received or considered;

c. A statement of matters officially recognized;

d. Questions and proffers of proof and objections and rulings thereon;

e. Proposed findings and exceptions;

f. Any decision, opinion, proposed or recommended order, or report by the officer presiding at the hearing;

g. All staff memoranda or data submitted to the hearing officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records;

h. All matters placed on the record after an ex parte communication pursuant to s. 120.66(2); and

i. The official transcript.

7. The agency shall accurately and completely preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost. In any proceeding before a hearing officer initiated by a consumptive use permit applicant pursuant to subparagraph 14., the applicant shall bear the cost of accurately and completely preserving all testimony and providing full or partial transcripts to the water management district. At the request of any other party, full or partial transcripts shall be provided at no more than cost.

8. Findings of fact shall be based exclusively on the evidence of record and on matters officially recognized.

9. Except as provided in subparagraph 13., the hearing officer shall complete and submit to the agency and all parties a recommended order consisting of his findings of fact, conclusions of law, interpretation of administrative rules, and recommended penalty, if applicable, and any other information required by law or agency rule to be contained in the final order. The agency shall allow each party at least 10 days in which to submit written exceptions to the recommended order.

10. The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order. The agency may not reject or modify the findings of fact, including findings of fact that form the basis for an agency statement, unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action. When there is an appeal, the court in its discretion may award reasonable attorney's fees and costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion.

* * *

(2) INFORMAL PROCEEDINGS.—In any case to which subsection (1) does not apply:

(a) The agency shall, in accordance with its rules of procedure:

1. Give reasonable notice to affected persons or parties of the action of the agency, whether proposed or already taken, or of its decision to refuse action together with a summary of the factual, legal, and policy grounds therefor.

2. Give affected persons or parties or their counsel an opportunity, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or of its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.

3. If the objections of the persons or parties are overruled, provide a written explanation within 7 days.

(b) The record shall only consist of:

1. The notice and summary of grounds;

2. Evidence received or considered;

3. All written statements submitted by persons and parties;

4. Any decision overruling objections;

5. All matters placed on the record after an ex parte communication pursuant to s. 120.66(2); and

6. The official transcript.

(3) Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.

(4) This section does not apply to agency investigations preliminary to agency action.

* * *

Fla. Stat. § 120.68 (1993)—Judicial review

(1) A party who is adversely affected by final agency action is entitled to judicial review. ... A preliminary, procedural, or intermediate agency action or ruling, including any order of a hearing officer, is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(2) Except in matters for which judicial review by the Supreme Court is provided by law, all proceedings for review shall be instituted by filing a petition in the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides. ... Review proceedings shall be conducted in accordance with the Florida Rules of Appellate Procedure.

* * *

(4) Judicial review of any agency action shall be confined to the record transmitted and any additions made thereto in accordance with subsection (6).

(5) The record for judicial review shall consist of the following:

(a) The agency's written document expressing the order, the statement of reasons therefor, if issued, and the record under s. 120.57, if review of proceedings under that section is sought.

(b) The agency's written document expressing the action, the statement of reasons therefor, if issued, and the materials considered by the agency under s. 120.54, if review is sought of proceedings under that section.

(c) The agency's written document expressing the action, and other written documents identified by the agency as having been considered by it before its action and used as a basis for its action, if review is sought of proceedings under s. 120.56 or s. 120.565 or if there has been no proceeding under s. 120.54 or s. 120.57.

(6) When there has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts, the court shall order the agency to conduct a prompt, factfinding proceeding under this act after having a reasonable opportunity to reconsider its determination on the record of the proceedings.

(7) The reviewing court shall deal separately with disputed issues of agency procedure, interpretations of law, determinations of fact, or policy within the agency's exercise of delegated discretion.

(8) The court shall remand the case for further agency action if it finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure. Failure of any agency to comply with s. 120.53 shall be presumed to be a material error in procedure.

(9) If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

(a) Set aside or modify the agency action, or

(b) Remand the case to the agency for further action under a correct interpretation of the provision of law.

(10) If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of s. 120.57, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record.

(11) If the agency's action depends on facts determined pursuant to subsection (6), the court shall set aside, modify, or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.

(12) The court shall remand the case to the agency if it finds the agency's exercise of discretion to be:

(a) Outside the range of discretion delegated to the agency by law;

(b) Inconsistent with an agency rule;

(c) Inconsistent with an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or

(d) Otherwise in violation of a constitutional or statutory provision;

but the court shall not substitute its judgment for that of the agency on an issue of discretion.

(13)(a) The decision of the reviewing court may be mandatory, prohibitory, or declaratory in form; and it

shall provide whatever relief is appropriate irrespective of the original form of the petition. The court may:

1. Order agency action required by law, order agency exercise of discretion when required by law, set aside agency action, remand the case for further agency proceedings, or decide the rights, privileges, obligations, requirements, or procedures at issue between the parties; and

2. Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

(b) If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as the court finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

(14) Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(15) No petition challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.54(4) or s. 120.56, unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact.

Fla. Stat. § 373.413 (1993)—Permits for construction or alteration

(1) Except for the exemptions set forth herein, the governing board or the department may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration

of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district. The department or the governing board may delineate areas within the district wherein permits may be required.

(2) A person proposing to construct or alter a stormwater management system, dam, impoundment, reservoir, appurtenant work, or works subject to such permit shall apply to the governing board or department for a permit authorizing such construction or alteration. The application shall contain the following:

(a) Name and address of the applicant.

(b) Name and address of the owner or owners of the land upon which the works are to be constructed and a legal description of such land.

(c) Location of the work.

(d) Sketches of construction pending tentative approval.

(e) Name and address of the person who prepared the plans and specifications of construction.

(f) Name and address of the person who will construct the proposed work.

(g) General purpose of the proposed work.

(h) Such other information as the governing board or department may require.

* * *

Fla. Stat. § 373.414 (1993)—Additional criteria for activities in surface waters and wetlands

(1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the regulated activity. If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the governing board or the department shall consider mitigation measures proposed by the applicant that cause net improvement of the water quality in the receiving body of water for those parameters which do not meet standards. If mitigation requirements imposed by a local government for surface water and wetland impacts of an activity regulated under this part cannot be reconciled with mitigation requirements approved under a permit for the same activity issued under this part, the mitigation requirements for surface water and wetland impacts shall be controlled by the permit issued under this part.

* * *

(8) The governing board or the department, in deciding whether to grant or deny a permit for an activity regulated under this part shall consider the cumulative impacts upon surface water and wetlands, as delineated in s. 373.421(1), within the same drainage basin as defined in s. 373.403(9), of:

(a) The activity for which the permit is sought.

(b) Projects which are existing or activities regulated under this part which are under construction or projects for which permits or determinations pursuant to s. 373.421 or s. 403.914 have been sought.

(c) Activities which are under review, approved, or vested pursuant to s. 380.06, or other activities regulated under this part which may reasonably be expected to be located within surface waters or wetlands, as delineated in s. 373.421(1), in the same drainage basin as defined in s. 373.403(9), based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations.

* * *

Fla. Stat. § 373.415 (1993)—Protection zones; duties of the St. Johns River Water Management District

(1) Not later than November 1, 1988, the St. Johns River Water Management District shall adopt rules establishing protection zones adjacent to the watercourses in the Wekiva River System, as designated in s. 369.303(10). Such protection zones shall be sufficiently wide to prevent harm to the Wekiva River System, including water quality, water quantity, hydrology, wetlands, and aquatic and wetland-dependent wildlife species, caused by any of the activities regulated under

this part. Factors on which the widths of the protection zones shall be based shall include, but not be limited to:

(a) The biological significance of the wetlands and uplands adjacent to the designated watercourses in the Wekiva River System, including the nesting, feeding, breeding, and resting needs of aquatic species and wetland-dependent wildlife species.

(b) The sensitivity of these species to disturbance, including the short-term and long-term adaptability to disturbance of the more sensitive species, both migratory and resident.

(c) The susceptibility of these lands to erosion, including the slope, soils, runoff characteristics, and vegetative cover. In addition, the rules may establish permitting thresholds, permitting exemptions, or general permits, if such thresholds, exemptions, or general permits do not allow significant adverse impacts to the Wekiva River System to occur individually or cumulatively.

* * *

(4) Nothing in this section shall affect the authority of the water management districts created by this chapter to adopt similar protection zones for other watercourses.

(5) Nothing in this section shall affect the authority of the water management districts created by this chapter to decline to issue permits for development which have not been determined to be consistent with local comprehensive plans or in compliance with land development regulations in areas outside the Wekiva River Protection Area.

(6) Nothing in this section shall affect the authority of counties or municipalities to establish setbacks from any surface waters or watercourses.

(7) The provisions of s. 373.617 are applicable to final actions of the St. Johns River Water Management District with respect to a permit or permits issued pursuant to this section.

Fla. Stat. § 373.617 (1993)—Judicial review relating to permits and licenses

(1) As used in this section, unless the context otherwise requires:

(a) "Agency" means any official, officer, commission, authority, council, committee, department, division, bureau, board, section, or other unit or entity of state government.

(b) "Permit" means any permit or license required by this chapter.

(2) Any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation. Review of final agency action for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence shall proceed in accordance with chapter 120.

(3) If the court determines the decision reviewed is an unreasonable exercise of the state's police power

constituting a taking without just compensation, the court shall remand the matter to the agency which shall, within a reasonable time:

(a) Agree to issue the permit;

(b) Agree to pay appropriate monetary damages; however, in determining the amount of compensation to be paid, consideration shall be given by the court to any enhancement to the value of the land attributable to governmental action; or

(c) Agree to modify its decision to avoid an unreasonable exercise of police power.

(4) The agency shall submit a statement of its agreed-upon action to the court in the form of a proposed order. If the action is a reasonable exercise of police power, the court shall enter its final order approving the proposed order. If the agency fails to submit a proposed order within a reasonable time not to exceed 90 days which specifies an action that is a reasonable exercise of police power, the court may order the agency to perform any of the alternatives specified in subsection (3).

(5) The court shall award reasonable attorney's fees and court costs to the agency or substantially affected person, whichever prevails.

(6) The provisions of this section are cumulative and shall not be deemed to abrogate any other remedies provided by law.

Fla. Admin. Code r. 17-312.030 (1994)—Jurisdiction

(1) Pursuant to Sections 403.031(12) and 403.913, F.S., dredging and filling conducted in, on, or over those surface waters of the state as provided in this rule, require a permit from the Department unless spe-

cifically exempted in Sections 403.813, 403.913, 403.927, F.S., or Rule 17-312.050, F.A.C.

* * *

Fla. Admin. Code r. 17-312.080 (1994)—Standards for Issuance or Denial of a Permit

(1) In accordance with Section 403.918(1), F.S., no permit shall be issued unless the applicant has provided the Department with reasonable assurance based on plans, test results or other information that the proposed dredging or filling will not violate water quality standards.

(2) No permit shall be issued unless the applicant provides the Department with reasonable assurance based on plans, test results or other information that the project is not contrary to the public interest in accordance with Section 403.918(2), F.S.

* * *

(4) A permit may contain specific conditions reasonably necessary to assure compliance with Section 403.918, F.S.

* * *

Fla. Admin. Code r. 17-312.300 (1994)—Intent

(1) It is the intent of this rule to implement Section 403.918(2)(b), F.S., by establishing criteria to be followed in evaluating proposals to mitigate the adverse impacts of dredging and filling in waters of the state that caused the project to be not permittable.

* * *

(3) The Department will, in each case, first explore project modifications that would reduce or eliminate the adverse environmental impacts of the project, and will suggest any such modifications to the applicant either in addition to or in lieu of mitigation, as provided

in Rule 17-312.060(10), F.A.C. The applicant shall consider modifications to the project proposed by the Department, whether or not a mitigation proposal has been submitted. Should such mutual consideration of modification and mitigation not result in a permittable project the Department must deny the permit.

(4) The Department shall consider any mitigation proposed by a permit applicant in accordance with this rule. Mitigation may be proposed by a permit applicant, or suggested by the Department only where the proposed dredging and filling would otherwise be unable to meet the criteria of Sections 403.918(1) and (2)(a), F.S., and Rule 17-312.080, F.A.C. However, mitigation may not be required by the Department. Mitigation is neither necessary for nor applicable to projects covered by general permits or projects exempt from the requirements for individual dredge and fill construction permits.

(5) It is understood that in certain circumstances mitigation proposals for dredging and filling projects will not be able to offset the adverse impacts of the project sufficiently to yield a permittable project. Such instances may include projects that are in or that would significantly degrade Outstanding Florida Waters, the presence of endangered species or the likelihood that a particular wetland type may not be successfully created.

(6) The Department recognizes that other agencies are concerned with adverse impacts on waters of the state and may require mitigation for such impacts. Mitigation or reclamation required by other agencies will be acceptable to the Department to the extent that such mitigation or reclamation fulfills the Department's statutory requirements. If not, additional measures

shall be necessary to fulfill the Department's requirements. It is the intent of the Department to reduce duplication of regulatory requirements. To that end, inspections, reports or other similar reviews of mitigation projects by the Department of Natural Resources or other agencies will be used to augment the Department's determination of compliance with permit requirements.

* * *

Fla. Admin. Code r. 17-312.340 (1994)—Evaluation of Mitigation Proposals

The Department recognizes that each mitigation proposal must be evaluated on a case by case basis. It is necessary to first determine the probability that the proposed mitigation will offset the actual adverse impacts of the dredging and filling, including cumulative impacts, as identified by those negative aspects of the project that resulted in a negative permitting balance. The Department in making this determination will consider the likelihood that the mitigation will be successful.

The permit applicant shall provide the Department with reasonable assurances that the mitigation shall meet the success criteria in Rule 17-312.350, F.A.C., and shall comply with the following standards, where applicable:

(1) Type of waters of the state.

(a) Reclamation activities pursuant to Section 211.32, F.S., may be considered as mitigation to the extent that the type, nature, and function of the biological systems existing prior to mining are restored or improved. For waters and mining activities that fall under the jurisdiction of the Florida Department of Natu-

ral Resources pursuant to Chapter 378, F.S., approved DNR reclamation plans that have been reviewed and favorably commented upon in writing by the Department prior to final approval by DNR will be presumed to be acceptable as mitigation by the Department with respect to the waters addressed in those plans. This presumption may only be rebutted by evidence that the plans do not fulfill the Department's statutory and regulatory requirements.

(b) For other activities, the Department will identify the functions that will be impacted by the project and that have resulted in the project being determined to be contrary to the public interest pursuant to Sections 403.918(1) and (2)(a), F.S. Based on that analysis the Department will judge whether the mitigation proposal will offset those identified negative aspects of the dredge and fill project. Offsetting the adverse impacts will usually be best addressed through protection, enhancement or creation of the same type of waters (e.g., Spartina marsh, Cypress swamp, etc.), as those being affected by the proposed project. However, where the waters being affected have been significantly altered by human activity or other factors such as, but not limited to, drainage or invasion of exotic or nuisance species, a mitigation proposal utilizing other types of waters may be considered. Where mitigation using other types of waters is considered, preference will usually be given to utilization of the type of waters that were historically present before alteration.

(2) Ratios for created waters of the state. The mitigation proposed shall be sufficient to offset the adverse impacts expected to occur due to the proposed dredging and filling that render the project unpermittable. For mitigation involving the creation of waters of the state, the Department shall use as a guideline two acres

created for each acre adversely impacted by the proposed dredging or filling. This guideline is for preliminary planning purposes only and the actual extent of wetland creation may be more or less based on a consideration of the factors listed in subparagraphs (a) through (h) below.

(a) The length of time that can be expected to elapse before the functions of the waters of the state identified during the permitting process as being adversely affected have been restored or offset.

(b) Any special designation or classification specified in Chapters 17-3, 17-4, or 17-312, F.A.C., affecting the water body.

(c) The type of waters to be created and the likelihood of successfully creating that type of waters.

(d) Whether or not the waters of the state to be affected by the proposed dredging or filling are functioning as natural, healthy waters of the state of that type, and the current condition and relative value of functions being performed by the areas affected by the proposed activity compared to the proposed character and quality of the wetlands to be created.

(e) Whether the waters of the state are unique for that geographical area.

(f) For mine reclamation activities subject to Chapter 211, F.S., Part II, whether the ratio is consistent with the mine reclamation plan submitted to the Department of Natural Resources.

(g) The presence or absence of exotic or nuisance plant species within the waters of the state to be disturbed or altered.

(h) Whether the proposed project eliminates waters or changes waters from one type to another.

(3) Ratios for enhanced waters of the state. It is recognized that stressed wetlands provide some degree of wetland function. When enhancement is proposed, the Department must make a judgment regarding the degree of enhancement expected to occur. The degree of expected enhancement must be weighed against the adverse impacts identified in the evaluation of the dredge and fill project. In general, ratios for enhanced waters shall be higher than for created waters. Factors that should be considered in establishing a ratio include:

(a) The degree to which the wetlands to be enhanced have been stressed.

(b) The type of stress the wetlands to be enhanced have experienced.

(c) The cause of the stress.

(d) Whether the proposed method of enhancement is one that will be low maintenance or self-regulating once implemented.

(e) The likelihood that the proposed enhancement will be successful in offsetting the adverse impacts of the dredge and fill project that caused the project to be not permittable.

(4) Protection of the mitigation area. The permit applicant shall propose appropriate methods to assure that the created or enhanced waters will not be adversely affected during the establishment phase by secondary impacts resulting from human activities such as, but not limited to, boat traffic and other recreational uses. Such assurances may include, but shall not be limited to, restricting access to the site.

(5) Exotic or nuisance species. The proposed mitigation plan shall include a requirement that exotic and nuisance species be removed from the mitigation area. The plan shall also include reasonable measures to assure that these species do not invade the mitigation area in such numbers as to affect the likelihood of success of the project. Depending on the topography of the area and the species involved, such measures could include, but not be limited to, continuing maintenance and/or a buffer zone.

(6) Location of mitigation area. Because the adverse impacts of a dredge and fill project rarely occur off-site, mitigation activities off-site are not generally acceptable unless they would better offset the adverse impacts. There are some instances where on-site mitigation may not be possible or may be restricted, such as, but not limited to, road projects and utility corridors. In such instances, the mitigation should be in close proximity to the dredge and fill site, in the same waterbody or within the same drainage basin, if possible. The negative aspects of the dredge and fill project must be offset by the off-site mitigation, as in any other mitigation.

When fish and wildlife habitat functions are a concern, several points shall be considered:

(a) The types of habitat function being performed at the site; such as fishery nursery area, rookery, multispecies habitat, foraging value, shelter value.

(b) The species to be affected by the project.

(c) The relative value of the site; such as whether it is the last remaining area of that habitat in the vicinity or whether the site is pristine.

(d) Whether the proposed off-site mitigation can reasonably be expected to offset the impacts of the project on specific habitat functions that would be affected as a result of the project.

(7) Use of donor sites. The use of waters of the state as plant or soil donor sites, where such use involves any dredging or filling, shall not be allowed except pursuant to an exempted activity, a Department permit or consent order.

(8) Location of donor site. Whenever practical, waters of the state which are to be dredged or filled shall be utilized as plant or soil donor sites for mitigation under this Part.

Fla. Admin. Code r. 17-312.370 (1994)—Restrictions on Property Use

(1) Property restrictions as mitigation.

(a) Conservation easements or other such deed restrictions, and land conveyances, will be considered as mitigation only where they offset potential adverse impacts of the proposed dredging and filling, including cumulative impacts pursuant to Section 403.919, F.S.

(b) Property restrictions and conveyances may be considered as mitigation when they would preclude development in wetlands otherwise unprotected by the regulatory processes in Section 403.918, F.S., or in waters of the state that may be subject to future dredge and fill permit applications. In certain circumstances property restrictions on or conveyance of uplands adjacent to protected wetlands will be acceptable. The evaluation of the lands proposed for restriction or conveyance will be considered with respect to whether they would offset the negative aspects of the dredge and fill project that have rendered it unpermittable.

(2) Conservation easements on mitigation areas.

(a) A conservation easement for any mitigation area created, enhanced or reclaimed as part of a mitigation proposal may be required as a condition of the dredge and fill permit under the following circumstances:

1. If the applicant proposes mitigation which, upon completion, would be outside the Department's dredge and fill jurisdiction, and the applicant cannot provide reasonable assurance that the mitigation of adverse impacts will not be lost after completion of the mitigation, the Department may require a conservation easement for such mitigation area, equal in duration to the period of time necessary to provide such reasonable assurance.

2. If necessary to provide a reasonable period of time for establishment of a functioning system, the Department may require a temporary conservation casement for the mitigation area, equal in duration to the period necessary for establishment of a functioning system in such area.

(b) The Department may accept a comparable use restriction such as, but not limited to, state or federal ownership.

(3) Requirements for conservation easements. Any conservation easement provided under Rule 17-312.370(1), F.A.C., shall be perpetual, and all conservation easements shall be consistent with the requirements of Section 704.06, F.S.

(a) It shall be the responsibility of the permit applicant to provide for a survey of the boundaries of any property which is being conveyed to the State or for which a conservation easement is being provided.

(b) The recording of the conservation easement is required and shall be the responsibility of the permittee.

(4) Title to mitigation area. The applicant shall demonstrate sufficient title to the created or enhanced waters of the state to meet the requirements of Rule 17-312.370(3)(a)-(b), above, or shall provide the appropriate conveyance from the owner or owners holding such title so that the requirements are met.

Fla. Admin. Code r. 40C-4.041 (1994)—Permitting Thresholds

(1) Unless expressly exempt by sections 373.406 and 403.813, F.S., or sections 40C-4.051 or 40C-44.051, F.A.C., an individual or general permit must be obtained from the District prior to the construction, alteration, operation, maintenance, abandonment or removal of any dam, impoundment, reservoir, appurtenant work or works and for the maintenance and operation of existing agricultural surface water management systems or the construction of new agricultural surface water management systems.

(2) The District issues three types of surface water management permits: conceptual approval permits, individual permits and general permits.

(a) A conceptual approval permit may be issued for projects that are to be developed in phases. A letter of conceptual approval does not authorize any construction.

(b) An individual or general permit is required prior to the construction, alteration, operation, maintenance, abandonment or removal of a surface water management system which:

* * *

10. Consists of or includes filling in, excavation in, or drainage of a wetland which is not isolated when any of the filling, excavation, or drainage is located within the Econlockhatchee River Hydrologic Basin; or

* * *

(d) An individual permit may be issued for projects which do not qualify for general permits under the provisions of Chapter 40C-40, F.A.C. An individual permit may authorize the construction, alteration, operation, maintenance, abandonment or removal of a system.

* * *

Fla. Admin. Code r. 40C-4.091 (1994)—Publications Incorporated by Reference

(1) The Governing Board hereby adopts by reference:

(a) Part I "Policy and Procedures," Part II "Criteria for Evaluation," section 16 "Wetlands," subsections 18.0, 18.1, 18.2, and 18.3 of section 18 "Wekiva River Hydrologic Basin Criteria," and Appendix K "Legal Description Upper St. Johns River Hydrologic Basin," "Legal Description Ocklawaha River Hydrologic Basin," "Legal Description of the Wekiva River Hydrologic Basin," "Legal Description of the Econlockhatchee River Hydrologic Basin," "Legal Description of the Sensitive Karst Areas Basin, Alachua County," and "Legal Description of the Sensitive Karst Areas Basin, Marion County" of the document entitled "Applicant's Handbook: Management and Storage of Surface Waters," effective 2-27-94.

* * *

(2) These documents provide information regarding the management and storage of surface waters permitting program.

(3) These documents may be obtained by contacting one of the following District offices:

Director, Division of Permit Data Services,
St. Johns River Water Management District,
P.O. Box 1429,
Palatka, Florida 32178-1429.

St. Johns River Water Management District,
7775 Baymeadows Way, Suite 102,
Jacksonville, Florida 32256.

St. Johns River Water Management District,
618 East South Street, Suite 200,
Orlando, Florida 32801.

St. Johns River Water Management District,
305 East Drive,
Melbourne, Florida 32904.

Fla. Admin. Code r. 40C-4.301 (1994)—Conditions for Issuance of Permits

(1)(a) To obtain a general or individual permit for operation, maintenance, removal or abandonment of a system or to obtain a conceptual approval permit each applicant must give reasonable assurance that such activity will not:

1. Adversely affect navigability of rivers and harbors;

2. Adversely affect recreational development or public lands;

3. Endanger life, health, or property;

4. Adversely affect the maintenance of minimum flows and levels established in chapter 40C-8, F.A.C.;

5. Adversely affect the availability of water for reasonable beneficial purposes;

6. Be incapable of being effectively operated;

7. Adversely affect the operation of a Work of the District established in chapter 40C-6, F.A.C.;

8. Adversely affect existing agricultural, commercial, industrial, or residential developments;

9. Cause adverse impacts to the quality of receiving waters;

10. Adversely affect natural resources, fish and wildlife;

11. Induce saltwater or pollution intrusion;

12. Increase the potential for damages to off-site property or the public caused by:

a. Floodplain development, encroachment or other alteration;

b. Retardance, acceleration, displacement or diversion of surface water;

c. Reduction of natural water storage areas;

d. Facility failure;

13. Increase the potential for flood damages to residences, public buildings, or proposed and existing streets and roadways; or

14. Otherwise be inconsistent with the overall objectives of the District.

(b) Because a proposed system may result in both beneficial and harmful effects in terms of various indi-

vidual objectives, in determining whether the applicant has provided evidence of reasonable assurance of compliance with Rule 40C-4.301(1)(a), F.A.C., the District may consider a balancing of specific effects to show the system is not inconsistent with the overall objectives of the District.

(2)(a) To obtain a general or individual permit for construction, alteration, operation, or maintenance of a system or to obtain a conceptual approval permit, each applicant must give reasonable assurance that such activity meets the following standards:

1. Adverse water quantity impacts will not be caused to receiving waters and adjacent lands;

2. Surface and ground water levels and surface water flow, including the minimum flows and levels established in chapter 40C-8, F.A.C., will not be adversely affected;

3. Existing surface water storage and conveyance capabilities will not be adversely affected;

4. The system must be capable of being effectively operated;

5. The activity must not result in adverse impacts to the operation of Works of the District established in chapter 40C-6, F.A.C.;

6. The quality of receiving waters will not be adversely affected such that the water quality standards set forth in chapters 17-3, 17-4, 17-302 and 17-550, F.A.C., will be exceeded.

7. Wetland functions will not be adversely affected;

8. Otherwise not be harmful to the water resources of the District.

(b) If the applicant has provided reasonable assurance that the design criteria specified in Applicant's Handbook Part II "Criteria for Evaluation" adopted by reference in subsection 40C-4.091(1), F.A.C., have been met, then it is presumed that the standards contained in paragraph (2)(a) above have been satisfied.

* * *

Fla. Admin. Code r. 40C-41.063 (1994)—Conditions for Issuance of Permits

* * *

(5) Within the Econlockhatchee River Hydrologic Basin the following standards and criteria are established:

* * *

(d) Riparian Wildlife Habitat Standard.

1. The applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a system within the following designated Riparian Habitat Protection Zone will not adversely affect the abundance, diversity, food sources or habitat (including its use to satisfy nesting, breeding and resting needs) of aquatic or wetland dependent species:

a. The wetlands contiguous with the Econlockhatchee River and the following tributaries: Little Econlockhatchee River north of University Boulevard, Mills Creek, Silcox Branch (branch of Mills Creek), Mills Branch (branch of Mills Creek), Long Branch, Hart Branch, Cowpen Branch, Green Branch, Turkey Creek, Little Creek, and Fourmile Creek;

b. The uplands which are within 50 feet landward of the landward extent of the wetlands above; and

c. The uplands which are within 550 feet landward of the stream's edge as defined, for the purpose of this subsection, as the waterward extent of the forested wetlands abutting the Econlockhatchee River and the above named tributaries. In the absence of forested wetlands abutting these streams, the stream's edge shall be defined, for the purpose of this subsection, as the mean annual surface water elevation of the stream; however, if hydrologic records are unavailable, the landward extent of the herbaceous emergent wetland vegetation growing in these streams shall be considered to be the stream's edge.

* * *

2. Any of the following activities within the Riparian Habitat Protection Zone are presumed to adversely affect the abundance, food sources, or habitat of aquatic or wetland dependent species provided by the zone: construction of buildings, golf courses, impoundments, roads, canals, ditches, swales, and any land clearing which results in the creation of any system. (activities not listed above do not receive a presumption of no adverse effect.)

3. The presumption in subparagraph 2. shall not apply to any activity which promotes a more endemic state, where the land in the zone has been changed by man. An example of such an activity would be construction undertaken to return lands managed for agriculture or silviculture to a vegetative community that is more compatible with the endemic land cover.

4. Applicants seeking to develop within the Riparian Habitat Protection Zone shall be given the opportunity to demonstrate that the particular development for which permitting is being sought will not have an adverse effect on the functions provided by the zone to

aquatic or wetland dependent species. The functions provided by the zone are dependent on many factors. When assessing the value of the zone to aquatic and wetland dependent species, factors which the District will consider include: vegetative land cover, hydrologic regime, topography, soils, and land uses, existing within and adjacent to the zone; and range, habitat, and food source needs of aquatic and wetland dependent species, as well as sightings, tracks, or other such empirical evidence of use.

5. The standard of subparagraph 40C-41.063(5)(d)1., may be met by demonstrating that the overall merits of the proposed plan of development, including the preservation, creation or enhancement of viable wildlife habitat, provide a degree of resource protection to these types of fish and wildlife which offsets adverse effects that the system may have on the abundance, diversity, food sources, or habitat of aquatic or wetland dependent species provided by the zone. Mitigation plans will be considered on a case-by-case basis upon detailed site specific analyses. The goal of this analysis shall be the determination of the value of the proposed mitigation plan to aquatic and wetland dependent species with particular attention to threatened or endangered species. Mitigation plans should include: the information set forth in subsection 16.1.5, Applicant's Handbook: Management and Storage of Surface Waters, for the uplands and wetlands within the zone and within other areas to be preserved, created or enhanced as mitigation for impacts within the zone; as well as other pertinent information, including land use, and the proximity of the site to publicly owned land dedicated to conservation. Implementation of this paragraph contemplates that the proximity of development to the river and tributaries named herein and ac-

tivities permitted in the zone may vary from place to place in support of a functional resource protection plan. Furthermore, some reasonable use of the land within the protection zone can be allowed under paragraph 40C-41.063(5)(d).

* * *

REPLY BRIEF

JAN 8 2013
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No. 11-1447

In the
Supreme Court of the United States

COY A. KOONTZ, JR.,
Petitioner,

v.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,
Respondent.

On Writ of Certiorari
to the Supreme Court of the State of Florida

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The District skirts the first Question Presented, never explaining why a permit exaction resulting in permit denial should be exempt from review under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Instead, it writes and answers its own "question presented" based on a fundamental misunderstanding of Mr. Koontz's claim, and an improper re-litigation of the record. Introducing a "straw man" argument, the District asks whether just compensation under *Nollan* and *Dolan* is available for the taking of land. But Mr. Koontz litigated his claim on the very different question of whether *Nollan* and *Dolan* apply to invalidate a permit exaction. That is the only issue the Florida Supreme Court resolved, the only issue before this Court, and the one issue the District avoids for most of its brief.

The District does address the second Question Presented of whether monetary exactions should be exempt from *Nollan/Dolan* review. After arguing—contrary to the lower courts' findings—that it never imposed any permit condition, it urges this Court to simply exempt from Takings Clause review under *Nollan* and *Dolan* all monetary exactions. But the District's proposed rule finds no support in this Court's precedents, including the principal case on which the District relies, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which is a fractured decision easily distinguishable from the facts of this case.

Nor is the exception supported by the District's "the sky will fall" arguments. After *Nollan* and *Dolan*, land-use regulation did not come to a halt. And, in those states that apply them to monetary exactions,

agencies still impose all manner of exactions—only now, they must do so within the parameters of the Takings Clause, so that no unconstitutional conditions are imposed.

In the District's view, the Takings Clause should impose ***no limitation whatsoever*** on an agency's flexibility to demand that an individual dedicate her money to a public use in exchange for a permit—presumably, because agencies can be "trusted" to not impose excessive exactions. Of course, the record in this case belies the District's dubious assurances. It is undisputed that Mr. Koontz was unfairly singled out to bear a public burden (improving government-owned lands) that should have been borne by the public as a whole; the demand bore no connection or proportionality to the impact of Mr. Koontz's modest project—a fact that the District itself recognized eleven years after imposing it, when it issued his permits without the condition. This kind of heavy handedness —exacting as much property out of a permit applicant as needed or wanted—will persist, so long as agencies know there is no Takings Clause limitation on their power. Trusting agencies to do the right thing is not the answer; making *Nollan* and *Dolan* review available to individuals faced with coercive property exactions—whatever their form and regardless of their timing—is.

SUPPLEMENTAL STATEMENT OF FACTS

A. This Matter Comes to the Court As a Permit Exaction Challenge

The District contends that Mr. Koontz invokes *Nollan* and *Dolan*, not to invalidate a permit condition,

but to obtain "just compensation" under federal takings law for a permit denial. The District is wrong. *Nollan* and *Dolan* were invoked to test the validity of the District's permit exaction that led to permit denial. The exaction's invalidity under federal constitutional law was, in turn, the ***predicate*** for Mr. Koontz's state law claim for state law damages against the District under section 373.617 of the Florida Statutes—a fact that may explain the District's confusion. Pet. Cert. App. B-6. While the interpretation of that Florida statute is neither before the Court nor necessary to its resolution of the Questions Presented, how the statute operates and was applied by the courts below helps to put the *Nollan/Dolan* issue in context.

Section 373.617(2) provides landowners and state agencies, like the District, a convenient procedure for testing whether agency action "is an unreasonable exercise of the state's police power constituting a taking without just compensation." Appendices to Brief for Respondent (Resp. App.) at 15a-16a. The statute allows an agency to correct an action that the trial court finds unlawful, without incurring further liability. *Id.*

If the court determines that agency action constitutes an unreasonable exercise of police power, it remands the matter to the agency, which has ninety days to propose to the court an order correcting the infirmity. Resp. App. at 16a (§ 373.617(4)). The statute gives agencies the alternatives of agreeing to issue the permit, pay appropriate damages, or modify its decision to avoid an unreasonable exercise of police power. *Id.* (§ 373.617(3)). If the agency proposes a satisfactory order within ninety days, the court "shall enter its final order approving the proposed order." *Id.*

(§ 373.617(4)). The statute contemplates no further remedial action.

On the other hand, if the agency fails to propose a satisfactory order within ninety days, "the court may order the agency to perform any of the alternatives" specified in the statute. *Id.* (§ 373.617(4)). For example, the court may order the agency to both issue the permit and pay damages, as authorized by section 373.617(3)(b). *Id.* That is precisely what happened here.

In 2002, Mr. Koontz's claim "was tried on whether the off-site mitigation required by the District was an unreasonable exercise of police power" under Section 373.617, with "the *Nollan* and *Dolan* cases . . . providing [the] constitutional tests." Pet. Cert. App. D-10 D-11; R 887-88. The trial court held that the District's exaction was unconstitutional under *Nollan* and *Dolan*, and invalidated it. *Id.* at D-11; R 1324 (District recognizing trial court "invalidated" the permit exaction). The court then relied upon the exaction's invalidity as the predicate for finding statutory liability under section 373.617. Pet. Cert. App. D-11. The court concluded that the District unreasonably exercised its police power by denying Mr. Koontz's permits for his refusal to acquiesce in an unconstitutional condition. *Id.*

In its judgment, the court instructed the District to propose an order curing the violation "within ninety (90) days," as provided in section 373.617(4). *Id.* But the District proposed no order, dug in its heels, and pursued an improper appeal, thereby exposing itself to further statutory remedies under section 373.617. *St. Johns River Water Management Dist. v. Koontz*, 861 So. 2d 1267, 1268 (Fla. Ct. App. 2003) (dismissing appeal

as premature, because District had to first propose order remedying violation).

Following the appeal, the District in 2004 proposed an order approving Mr. Koontz's permits without the unconstitutional exaction. R 1028. The trial court approved the District's proposal, ordered it to approve Mr. Koontz's permits within thirty days, and reserved jurisdiction to determine statutory damages. JA 183. But instead of approving the permits as ordered, the District pursued a second premature appeal. *St. Johns River Water Management Dist. v. Koontz*, 908 So. 2d 518 (Fla. Ct. App. 2005) (dismissing appeal as premature, because trial court still had to determine damages). The District finally approved the permits in 2005—after realizing (as Mr. Koontz had argued all along) that the amount of wetlands on Mr. Koontz's property was ***significantly less*** that originally believed." Pet. Cert. App. A-7 (emphasis added); *see also* Pet. Cert. App. C-2; JA 183.

In 2006, the court awarded Mr. Koontz statutory damages under section 373.617. Pet. Cert. App. C-1 C-2; Pet. Cert. App. D-11; JA 182-84. Importantly, the court did not award the constitutional remedy of just compensation for a *Nollan/Dolan* violation. *That* specific violation (imposing an unconstitutional condition) already had been remedied by the exaction's invalidation and subsequent approval of the permits without it. *Id.* Damages were a statutory remedy that compensated Mr. Koontz for the District's unreasonable exercise of the police power under state law for the period when it unlawfully withheld permits. The District did not appeal the availability of a damages remedy under section 373.617.

Thereafter, the District appealed the judgment of statutory liability that was premised on the unconstitutionality of the District's permit exaction under *Nollan* and *Dolan*. R 1331-44; *See* Initial Br. of Appellant St. Johns River Water Management District (Fla. Ct. App. No. 5D06-1116, Jul., 17, 2006). The Florida appellate and supreme courts resolved one issue—i.e., whether *Nollan* and *Dolan* applied to invalidate the District's permit exaction.[1] Like the trial court, the court of appeal concluded they did; the Florida Supreme Court concluded they did not. Pet. Cert App. A-19; Pet. Cert. App. B-8 B-10; Pet. Cert. App. D-10 - D-11; JA 94-96; JA 186. That federal-law issue is now properly before this Court; the application of section 373.617 and its remedies are not.

Nor is it necessary for the Court to address state-law issues in order to resolve the federal Questions Presented. *Nollan* and *Dolan*'s application to the District's exaction—a purely federal-law issue—does not turn on whether such application might also support a state-law claim or remedy, like damages under section 373.617. The Takings Clause either does or does not protect against monetary exactions resulting in permit denial, regardless of the state claims and remedies available to a successful plaintiff.

---

[1] *See, e.g.*, Pet. Cert. App. A-1 (asking whether "the Fifth Amendment to the United States Constitution . . . recognize[s] an exactions taking" in the District's demands for off-site mitigation); *id.* at A-6 A-7 ("[T]he trial court applied the constitutional standards enunciated in *Nollan* and *Dolan*."); *id.* at B-5 ("[T]he trial court applied the constitutional standards enunciated by the Supreme Court in *Nollan* and *Dolan*."); *id.* at D-10 - D-11 (*Nollan* and *Dolan* provide the "constitutional tests applicable to the Koontz property.").

B. The District Imposed Specific Exactions

The District disputes that it "demand[ed]" something of Mr. Koontz, because it was Mr. Koontz's obligation—not the District's—to identify mitigation sufficient for permit approval. Resp. Brief at 38-39. The District also disputes that it imposed a "particular condition," given that it proposed mitigation alternatives before denying the permits. *Id.*

The District contradicts its own position throughout the litigation, and findings made by the lower courts. In the parties' Joint Pre-Trial Statement, the District admitted that "the denials [of Mr. Koontz's permits] were based exclusively on the fact that [he] would not provide additional mitigation to offset impacts from the proposed project." JA 70. "Had [he] offered the additional mitigation . . . the exact project Koontz proposed would have been permitted." JA 70-71. In its brief to the Florida Supreme Court, the District admitted that "[it] required additional mitigation before it would authorize" the permits and that "[a]dditional mitigation would be 'off-site' because the available conservation land on-site was, in [the District's] view, insufficient mitigation." Petitioner's Br. on Jurisdiction, at 1 (Fla. Sup. Ct. No. SC09-713, May 7, 2009).

Consistent with the District's representations, the trial court found that "the off-site mitigation conditions [were] imposed upon Koontz by the District." Pet. Cert. App. D-1. The court of appeal affirmed the trial court's judgment "that the off-site mitigation imposed by the District had no essential nexus to the development restrictions already in place on the Koontz property and was not roughly proportional to

the relief requested by Mr. Koontz." *Id.* at B-5 B-6. Significantly, the appeals court stated that "[t]he District makes no challenge to the evidentiary foundation for these factual findings"—including the finding that the District had in fact imposed the off-site-improvement exaction. *Id.* at B-6.

The District also did not challenge the evidentiary foundation for the findings in the Florida Supreme Court, but only the propriety of applying *Nollan* and *Dolan* to the undisputed facts. Petitioner's Br. on Jurisdiction (Fla. Sup. Ct. No. SC09-713). Consequently, the supreme court adopted the trial court's finding that the District required off-site mitigation as a condition of permit approval, but held that *Nollan* and *Dolan* did not apply. Pet. Cert. App. A-19; *id.* at A-6 (reciting trial court findings).

Moreover, the fact that the District proposed alternative forms of mitigation prior to denying Mr. Koontz's permit is irrelevant. As the court of appeal noted, "the trial court decided ***as fact*** that the conservation easement offered by Mr. Koontz was enough and that any more would exceed the rough proportionality threshold, whether in the form of off-site mitigation or a greater easement dedication for conservation." Pet. Cert. App. B-10 n.5 (emphasis added). Neither the court of appeal nor the supreme court disturbed that finding.[2]

---

[2] The undisputed fact that the project site had no viable wetlands, fish, or wildlife (Pet. Cert. App. D-3; JA 113-17, 137, 146) renders irrelevant the District's and its amici's lengthy discussions about the importance of wetlands, and the legitimacy of federal and state efforts to protect them—which Mr. Koontz does not dispute.

Finally, it is disingenuous for the District to deny that it required specific permit exactions. The District alone holds the power to grant or deny permits. While applicants may have some "choice" about the form of mitigation they undertake, they have absolutely no say as to whether mitigation is necessary or how much mitigation is sufficient to secure permit approval. The District alone mandates the need for and sufficiency of mitigation.

ARGUMENT

I

NOLLAN AND *DOLAN* SHOULD APPLY WHERE AN APPLICANT'S REFUSAL TO ACCEDE TO AN UNCONSTITUTIONAL CONDITION RESULTS IN PERMIT DENIAL

The District demanded that Mr. Koontz finance improvements to 50 acres of wetlands on District-owned property as a condition of permit approval. When Mr. Koontz refused, the District denied his permit applications. The Florida Supreme Court held that *Nollan* and *Dolan* did not apply to the exaction, in part because no permit ever issued and, therefore, no property ever changed hands. Pet. Cert. App. A-21.

This holding is the basis of the first Question Presented: Is it constitutionally relevant for the purpose of applying *Nollan* and *Dolan* that the District's exaction was imposed as a condition precedent to permit approval and resulted in permit denial? It is not. As explained in Mr. Koontz's Brief on the Merits (at 29-39), because the only constitutionally

relevant fact is that the District imposed its exaction as a condition of permit ***issuance***, *Nollan* and *Dolan* apply.

Nowhere in its brief does the District contest this point. Resp. Brief at 28 (dismissing, without discussion, the question of "whether or not the timing is relevant when a landowner seeks to invalidate an unconstitutional condition"). The District does not dispute that the Takings Clause and the unconstitutional conditions doctrine attribute no constitutional significance to an exaction's timing. Nor does the District dispute that, in both *Nollan* and *Dolan*, the agencies had imposed the exactions before issuing permits, which is precisely what happened here.

Instead, the District improperly re-litigates the facts of this case so as to escape *Nollan* and *Dolan* review. The District alleges that it imposed no exaction on Mr. Koontz's permits, so there is nothing for *Nollan* and *Dolan* to apply to. Resp. Brief at 38-39. But as explained above, the District's allegation contradicts findings made by the trial court, and adopted by the court of appeal and supreme court. The District indisputably ***did*** impose two specific exactions—the on-site and off-site exactions.

Moreover, it makes no constitutional difference that the District "negotiates" with applicants over suggested mitigation alternatives, and leaves it to them to decide the nature and amount of the exactions necessary for permit approval. Resp. Brief at 39. This exaction scheme—whereby the District requires applicants to choose their own poison—is an attempt to skirt its constitutional burden of establishing the requisite connection between exactions and the impact

of a project. *Dolan*, 512 U.S. at 398. If all permitting agencies constitutionally could employ this artifice for imposing exactions, *Nollan* and *Dolan* would be dead letters, for applicants could simply be pressured by "suggestions" to acquiesce in otherwise unconstitutional exactions.

Furthermore, the District raises concerns about how *Nollan* and *Dolan* could apply "where there is no final 'required dedication,' but only a series of alternative proposals, none of which is ever insisted upon as the *sine qua non* of a permitting decision." Resp. Brief at 41. The District worries that courts "would have to examine each of the potential options that the agency suggested to the applicant during the permitting process." *Id.* There is no basis for the District's concerns.

Here, there is no question that the District took final agency action to deny Mr. Koontz's permits, simply because he refused to acquiesce in a specific unconstitutional condition. *Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560, 562 (Fla. Ct. App. 1998) ("There is no requirement that an owner turned down in his effort to develop his property must continue to submit offers until the government finally approves one before he can go to court."), *rev. denied*, 729 So. 2d 394 (Fla. 1999). In any event, Mr. Koontz does not contend that an agency's mitigation suggestions—without final agency action—are actionable under *Nollan* and *Dolan*.

The District's concern over a court having to review, under *Nollan* and *Dolan*, multiple alternatives for mitigation contained in a final agency action is equally unfounded. If a permit is denied for failure to

accept any one of several mitigation alternatives, all of them should be reviewed under those precedents. Those alternatives bearing an essential nexus and proportionality to the impact of a proposed use would be upheld, while the others would be invalidated. There is nothing particularly problematic with applying *Nollan* and *Dolan* fairly and consistently to all permit exactions of property.

Of course, this issue is not pertinent here. It is true that the District's final orders cite mitigation alternatives that Mr. Koontz could have accepted to secure permit approval. But, as the Florida court of appeal noted, the trial court decided "as fact" that any exaction beyond Mr. Koontz's 11-acre conservation easement would bear no relationship or proportionality to the impact of his proposed use. Pet. Cert. App. B-10 n.5. And in its brief to the Florida Supreme Court, the District was more specific about the exaction whose rejection triggered permit denial, admitting that the "[a]dditional mitigation would be 'off-site' because the available conservation land on-site was, in [the District's] view, insufficient mitigation." Petitioner's Br. On Jurisdiction, at 1 (Fla. Sup. Ct. No. SC09-713).

Finally, the District warns that *Nollan* and *Dolan* review of exactions resulting in permit denial would lead agencies to deny permits outright without any discussion or negotiation. Resp. Brief at 40. Not so. Denying a permit for no reason would expose agencies to liability for arbitrary and capricious decision-making, and violation of laws requiring final decisions to contain findings of facts and conclusions of law. *See, e.g., Graham v. Estuary Props., Inc.*, 399 So. 2d 1374, 1379 (Fla. 1981) ("If the state denied a permit without showing the existence of an adverse or

unfavorable impact, there would be no showing that the regulation protected the health, safety, or welfare of the public; without such a showing the denial would be arbitrary and capricious."). *Nollan* and *Dolan* do not change agencies' obligation to be fair and transparent in the decision-making process. On the other hand, providing legitimate reasons for a permit denial—like an applicant's refusal to accept ***lawful*** permit conditions—shields agencies from liability. Thus, applying *Nollan* and *Dolan* to permit exactions whose rejection results in permit denials not only protects property owners against extortionate conditions; it also provides clear guidance to agencies who seek to protect permit denials against legal challenge.

On the other hand, exempting exactions that lead to permit denial from *Nollan/Dolan* review would create a dangerous loophole. To insulate all permit exactions, all an agency would have to do is make them conditions precedent to permit approval. If an applicant refused to accede to an excessive exaction—or even agreed under protest, in order to preserve a later challenge—the agency would deny the permit. If the applicant were coerced into acquiescing in the exaction without objection, the permit would be approved, but the applicant would forever lose the right to challenge the exaction. Thus, all permit exactions would escape Takings Clause scrutiny, effectively nullifying *Nollan* and *Dolan*.

II

NOLLAN AND *DOLAN* SHOULD APPLY TO PERMIT EXACTIONS REGARDLESS OF THE FORM OF THE PROPERTY EXACTED

The District's demand that Mr. Koontz personally finance improvements to public lands was a demand that he dedicate his money to a public use with no compensation. The uncompensated taking of private property is prohibited by the Takings Clause, whose purpose is to "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). That prohibition extends to confiscations of money, which has long been recognized by the Court as private property presumptively entitled to Takings Clause protection. *Village of Norwood v. Baker*, 172 U.S. 269 (1898);[3] *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003) (acknowledging that money interest could be "taken"); *id.* at 252 (Scalia, J. dissenting) (state law taking private parties' interest on principal "confiscated property" without compensation in violation of the Takings Clause).

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[3] The District argues that *Village of Norwood* is not on point, because the challenged assessment "effected an uncompensated condemnation of real property." Resp. Brief at 47 n.17. It misreads the case. Norwood condemned petitioner's property for a road, paid compensation, then tried to reclaim the money by demanding that she pay it back as an alleged assessment on her property. She sued, claiming the assessment effected an uncompensated taking. The Court held that imposing upon the property owner the entire financial obligation of paying for the condemnation effected a taking. The Court viewed Norwood's monetary demand as actionable under the Takings Clause.

Phillips v. Wash. Legal. Found., 524 U.S. 156, 169, 172 (1998) (money and interest accrued thereon is property within the meaning of the Takings Clause); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (finding Takings Clause violation where "exaction [of money interest] is a forced contribution to general governmental revenues").

Certainly, this Court has recognized circumstances where a governmental appropriation of money does not effect a taking. For example, "taxes and user fees . . . are not takings." *Brown*, 538 U.S. at 243 n.2 (Scalia, J., dissenting); *United States v. Sperry Corp.*, 493 U.S. 52, 62 (1989) (holding that user fee was not a taking); *County of Mobile v. Kimball*, 102 U.S. 691, 703 (1880) (concluding that "taxation for a public purpose" was not a taking). That is uncontroversial; certainly, Mr. Koontz does not dispute that taxes, user fees, and other ordinary charges that are different in kind from permit exactions are exempt from takings challenges. At the same time, the long-recognized power of governments to engage in these particular kinds of money appropriation is not a license to confiscate money willy-nilly without Takings Clause oversight. Ultimately, a takings claim must be assessed on the facts of the case, "not by resorting to blanket exclusionary rules." *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, No. 11-597 slip op. at 12 (Dec. 4, 2012); see also *id.* at 7 ("In view of the nearly infinite ways in which government actions or regulations can affect private property interests, the Court has recognized few invariable rules in this area."). To carve out of the Takings Clause a blanket exemption for all money confiscations would nullify the Clause's protections: Government could condemn an individual's land, pay just compensation,

then reclaim the money by demanding it from her, with no limitation under the Takings Clause.[4]

A. The District's Proposed Rule To Exempt Money Confiscations from the Takings Clause Should Be Rejected

The District would have this Court create a blanket exemption in the Takings Clause for money confiscations. Under the District's rule, the government's demand that an individual dedicate money to a public use is never a compensable taking under the Takings Clause. Resp. Brief at 43. The District justifies its categorical rule on several grounds, none of which has any merit.

The District claims that the Court's "money takings" cases—*Phillips*, *Brown*, and *Webb's Fabulous Pharmacies*—are inapposite. Resp. Brief at 46. Those cases involved a "specific property interest" (accrued interest) that was actually seized, while this case involves "fungible money" that the District never took. Resp. Brief at 46. Property may not have changed hands here as it did in those cases, but property is not *supposed* to change hands in a permit-exaction case: *Nollan* and *Dolan* exist to prevent the consummation of unlawful permit exactions.

Moreover, while *Phillips*, *Brown*, and *Webb's Fabulous Pharmacies* each had to do with the taking of a particular form of money (accrued interest), the holdings did not turn on the "specific property v.

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[4] As explained below, there may be *other* limitations, but only the Takings Clause would address the fundamental concern that the government was forcing one individual to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

fungible money" distinction that the District eagerly plays up.[5] And the decisions do not support the District's attempt to carve out a massive exception to the Takings Clause for certain kinds of monetary confiscations. Quite the contrary, they only affirm Mr. Koontz's point that the Takings Clause generally protects against monetary confiscations.

In *Phillips*, the Court held that money interest is "the 'private property' of the owner of the principal." *Phillips*, 524 U.S. at 172. In *Brown*, the Court held that, because money interest is private property protected by the Takings Clause, a law requiring "the transfer of the interest" to a third party is a per se taking. *Brown*, 538 U.S. at 235 (ultimately concluding that no compensation was due for the taking). And in *Webb's Fabulous Pharmacies*, the Court found that a county's "exaction" of interest on principal deposited in a court registry was "a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts." *Webb's Fabulous Pharmacies*, 449 U.S. at 163. The Court held that the confiscation of the interest was an unlawful taking without compensation. *Id.* at 164. These cases

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[5] The "fungibility of money" point is of recent vintage, having been mentioned for the first time in dicta in *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989). In *Sperry*, the United States and Iran set up a tribunal in order to process claims made by Americans against Iran. Federal law required the deduction of a "user fee" from tribunal awards to reimburse the United States Government for costs associated with maintaining the tribunal. The Court held that user fees are not takings. The "fungibility of money" point was unnecessary to the holding and has not been invoked to create a Takings Clause exception for monetary confiscations.

stand for the proposition that money confiscations generally are analyzed as takings.

The District also claims its rule is compelled by *Eastern Enterprises*. There, a plurality concluded that a federal statute imposing retroactive liability on a former coal company to provide lifetime medical benefits for retirees resulted in an unconstitutional taking of the company's property in violation of the Takings Clause. *Eastern Enterprises*, 524 U.S. at 517-19 (O'Connor, J., plurality opinion). Justice Kennedy concurred in the judgment and partly dissented; he too found the statute unconstitutional, but on the grounds that it violated the Due Process Clause. *Id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part). Four dissenting Justices would have upheld the statute against both takings and due process challenges. *Id.* at 567-68 (Breyer, J., dissenting, joined by Stevens, Souter, Ginsburg, JJ.). Because the decision produced no majority rationale, its only precedential effect is in the "specific result"—*i.e.*, the statute was unconstitutional. *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255 (D.C. Cir. 1998). Certainly, the case does not stand for the District's proposition that a government demand that an individual dedicate his money to a public use never can be a taking.

The District nevertheless relies on Justice Kennedy's partial dissent and Justice Breyer's dissent, in which they found the Takings Clause inapplicable. But the facts of *Eastern Enterprises* are so distinguishable from this case that the concerns raised by them are not present here. *Eastern Enterprises* involved a legislative effort to retroactively transfer money from one private party to

another, without enriching the government. *Eastern Enterprises*, 524 U.S. at 554 (Breyer, J., dissenting); *id.* at 545 (Kennedy, J. concurring in the judgment and dissenting in part). It looked more like a regulation adjusting the burdens and benefits of economic life than a direct and individualized confiscation of an individual's property for public use. *Id.* at 522-23 (O'Connor, J., plurality). Furthermore, the crux of the company's claim appears to have rested on "the potential unfairness of retroactive liability"—a quintessentially due process issue—rather than the unfairness of forcing one person to bear public burdens that should be borne by the public as a whole—a quintessentially takings issue. *Id.* at 556 (Breyer, J., dissenting); *id.* at 547 (Kennedy, J., concurring in the judgment and dissenting in part).

In stark contrast, the District's requirement that Mr. Koontz personally finance public improvements to its lands was not an economic regulation, but a targeted and individualized demand for his funds that unequivocally stood to enrich the District. The exaction was imposed with regard to a specific property interest: his land. Indeed, the District based the need and amount of the exaction on the alleged impact of his proposed land use and the extent to which he could dedicate his undeveloped land to conservation. Petitioner's Br. on Jurisdiction, at 1 (Fla. Sup. Ct. No. SC09-713). Unlike the statute in *Eastern Enterprises*, the District's exaction not only implicated his right to keep and dispose of a protected property interest (his money), but independently burdened his right under the Takings Clause to make reasonable use of his land. And Mr. Koontz's challenge goes right to the heart of the Takings Clause inquiry: Was he singled out to bear a public

burden that should be borne by the public as a whole? Only *Nollan* and *Dolan* can answer that question.

Unsurprisingly, the District is unable to find a single case applying *Eastern Enterprises* to a monetary exaction. Instead, it cites to a handful of appellate decisions applying Justice Kennedy's partial dissent to general laws providing employment benefits, setting traffic fines, and imposing assessments—laws much like the statute in *Eastern Enterprises*. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 386-87 (4th Cir. 2011) (survivor's benefits under Black Lung Benefits Act); *McCarthy v. City of Cleveland*, 626 F.3d 280, 284-86 (6th Cir. 2010) (fines allowed by traffic camera ordinance); *Swisher Int'l v. Schafer*, 550 F.3d 1046, 1057 (11th Cir. 2008) (statute imposing general assessment on cigar manufacturers); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) (utility assessment).

In sum, the District's attempt to shoehorn this case into the *Eastern Enterprises* dissents fails. *Eastern Enterprises*—a fractured decision producing no majority rationale—is not the case on which to base a blanket exemption to the Takings Clause. The District's sweeping rule to exempt an entire category of government confiscations from the Takings Clause lacks support in any of this Court's precedents. And it flies in the face of the Court's admonition against categorical rules in takings law. *Arkansas*, 133 S. Ct. 511, No. 11-597 slip op. at 12; *see also id.* at 7 ("In view of the nearly infinite ways in which government actions or regulations can affect private property interests, the Court has recognized few invariable rules in this area.").

B. The Sky Will Not Fall If Government Must Show That Monetary Exactions Satisfy *Nollan* and *Dolan*

The District raises three concerns about applying *Nollan* and *Dolan* to monetary exactions. First, the District fears that, without some limiting principle, applying those cases to monetary exactions means that they must apply to taxes, user fees, and other ordinary charges. Resp. Brief at 48-49. Of course, there is an important limitation to *Nollan* and *Dolan*'s applicability that the District ignores. They apply only within the land-use permitting context to exactions of property imposed as permit conditions. Taxes, user fees, and the like are not imposed in the land-use permitting context and, therefore, are not subject to *Nollan/Dolan* review. Some jurisdictions already recognize *Nollan* and *Dolan*'s application to monetary exactions. *See* Brief Amicus Curiae of Owners' Counsel of America at 10. But there is no evidence—and the District cites none—of an explosion of "takings litigation" challenging taxes, user fees, and similar charges under *Nollan* and *Dolan*.

Second, the District expresses concern that, under Mr. Koontz's theory, there would be "an exaction taking every time a permit applicant incurs costs to bring himself into compliance with a generally applicable regulatory standard." Resp. Brief at 49. But *Nollan* and *Dolan* do not prohibit monetary exactions; the scrutiny they require simply smokes out those that bear no nexus or proportionality to the impact of a proposed project. There is no evidence that land-use regulation has come to a halt in those jurisdictions that apply *Nollan* and *Dolan* to monetary exactions, including heavily regulated jurisdictions

like California. *See, e.g., Ocean Harbor House Homeowners Assn. v. Cal. Coastal Comm'n*, 163 Cal. App. 4th 215, 220 (2008) (applying *Nollan/Dolan* review to and upholding monetary exaction); *see also* Brief Amicus Curiae of Owners' Counsel of America at 14-19 (detailing *Nollan/Dolan*'s benefits to land-use planning).

The District assures the Court that, even if monetary exactions are exempt from review under *Nollan* and *Dolan*, agencies still face constitutional restraints. Resp. Brief at 50. The District cites the availability of other takings claims under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) or *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) claims under the Due Process and Equal Protection Clauses, and state-law takings and due process claims. But none of these alternatives address the unique concerns raised by permit exactions: (1) Is the property owner being singled out to bear a public burden that should be borne by the general public?; and (2) Is the property owner being coerced into giving up a constitutional right in order to exercise another right or obtain a benefit?

Lucas and *Penn Central* are regulatory takings tests used for the specific purpose of assessing whether a regulation or permit denial restricts the use of land to such an extent that it effects a taking of that land. Those cases have no bearing whatsoever on the very different question of whether a permit *condition* bears a constitutionally sufficient relationship to the impact of a proposed use of the land. Only *Nollan* and *Dolan* can answer that question, which is why they—rather than *Lucas* and *Penn Central*—apply in the "special context of land-

use exactions." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005).

Due process and equal protection claims are also inapt. A due process claim questions whether the exaction serves some legitimate purpose, and an equal protection claim asks whether the exaction is applied equally to similarly situated individuals. But neither claim addresses whether a particular individual has been targeted to bear a public burden that should be borne by the general public, or whether he should be required to give up a constitutional right in exchange for the ability to use his land. Again, only *Nollan* and *Dolan* can answer these constitutional concerns.

Finally, some state-law claims may address the concerns that permit exactions raise. But the relevant question is whether the Federal Constitution provides a floor of protection against excessive monetary exactions imposed in the permitting process. Given the specific values that the Takings Clause and the unconstitutional conditions doctrine embody, it must: *Nollan* and *Dolan* should apply to all monetary exactions to ensure that no landowner is singled out to unfairly bear public burdens that benefit everyone.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

DATED: January, 2013.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-1447

In the Supreme Court of the United States

COY A. KOONTZ, JR., PETITIONER

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a regulatory takings claim based on the government's denial of a development permit should be analyzed under the usual framework of *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), or, instead, under the specialized framework of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), which this Court developed in the context of land-use exactions.

2. Whether a condition on a development permit that requires a landowner to expend money can be the basis of an exaction-takings claim under *Nollan* and *Dolan*.

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In the Supreme Court of the United States

No. 11-1447

COY A. KOONTZ, JR., PETITIONER

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns a challenge under the Just Compensation Clause of the Fifth Amendment to a state water management district's denial of a land development permit. Most of the property the landowner sought to develop was wetlands located in a protected zone of a river basin. The permit denial was based on the district's conclusion that the landowner had proposed insufficient mitigation to offset the impact of the planned destruction of the wetlands. In implementing the Clean Water Act, 33 U.S.C. 1251 *et seq.* the federal government administers programs intended to avoid or minimize adverse impacts to wetlands caused by discharges of dredged or fill material. In deciding whether to grant permits authorizing discharges of such material into wetlands, the federal government considers whether the permit applicant could compensate for the pro-

posed loss of resources through mitigation. The United States has a substantial interest in the sound development of the relevant constitutional analysis in cases that may affect its ability to implement the Clean Water Act, consistent with constitutional protections. The United States also has a substantial interest in supporting state governments' efforts to protect the Nation's wetland resources, consistent with constitutional requirements.

STATEMENT

Wetlands are an important natural resource, and their depletion has caused significant economic and environmental harm. Like the federal government, Florida has taken measures to protect remaining wetlands and to replace some of what has been lost. When a landowner seeks a development permit for a project that will destroy wetlands, both the federal government and Florida require the landowner to mitigate the loss as a condition of issuing the permit. Petitioner sought to undertake such a project.[1] Finding petitioner's proposed mitigation insufficient, respondent suggested several possible alternative measures, including that petitioner enhance publicly owned wetlands at another location. Because petitioner declined to undertake the mitigation suggested by respondent or propose an acceptable alternative, respondent denied petitioner's permit request. Petitioner brought this inverse condemnation action, alleging that respondent's proposed off-site mitigation constituted an exaction taking without

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[1] Coy A. Koontz, Sr., owned the property at issue and sought the development permit. Pet. Br. 2. Petitioner Coy A. Koontz, Jr., is the son of Coy A. Koontz, Sr., and the personal representative of his estate. *Id.* at 2 n.2. This brief uses "petitioner" to refer to either or both individuals, without distinguishing between them.

just compensation. The Supreme Court of Florida rejected that claim.

1. Wetlands are, generally, "lands where saturation with water is the dominant factor determining the nature of soil development and the types of plant and animal communities living in the soil and on its surface." U.S. Envtl. Prot. Agency (EPA), *Wetlands Definitions*, http://water.epa.gov/lawsregs/guidance/wetlands/definitions.cfm. Wetlands are essential to the environmental and economic well-being of the United States. A one-acre wetland can soak up and store a significant amount of water, typically about one million gallons. EPA, *Wetlands: Protecting Life and Property from Flooding* 1 (May 2006), http://water.epa.gov/type/wetlands/outreach/upload/Flooding.pdf. For that reason, wetlands act as natural buffers, reducing the frequency and intensity of inland and coastal flooding. EPA, *Economic Benefits of Wetlands* (*Economic Benefits*) 1 (May 2006), http://water.epa.gov/type/wetlands/outreach/upload/EconomicBenefits.pdf.

Wetlands are also natural filters, absorbing pollution, thus improving drinking water quality and protecting fish and other aquatic life. *Economic Benefits* 1. Wetlands are vital to the Nation's multi-billion-dollar fishing industry. Seventy-five percent of the fish and shellfish commercially harvested in the United States and 90 percent of the recreational fish catch depend on wetlands at some point in their life cycle. *Id.* at 3; see EPA, *Functions and Values of Wetlands* 2 (Sept. 2001), http://water.epa.gov/type/wetlands/outreach/upload/fun_val_pr.pdf (estimating that "almost $79 billion per year is generated from wetland-dependent species"); see generally *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-135 (1985) (discussing ecological im-

portance of wetlands); Br. of Amici Former Members of the Nat'l Research Council 5-10 (same).

Despite their importance, "[w]etlands are disappearing at a rapid rate." Fish & Wildlife Serv. (FWS), U.S. Dep't of the Interior, *Report to Congress: Wetlands—Losses in the United States, 1780's to 1980's* ii (*Losses*) (1990). "Over a period of 200 years, the lower 48 states lost an estimated 53 percent of their original wetlands," *id.* at 1, equaling approximately 117 million acres, see *id.* at 5. That loss has had significant economic consequences. The disappearance of wetlands in the Upper Mississippi Basin, for instance, "contributed to high floodwaters during the Great Flood of 1993 that caused billions of dollars in damage." *Economic Benefits* 1. The disappearance of wetlands also undermines the integrity of the Nation's drinking water supply. *Losses* 10.

Congress responded to the dramatic decline in wetlands in several ways. In the mid-1980s, Congress authorized federal acquisition of wetlands. 16 U.S.C. 3922; see also 16 U.S.C. 4401 *et seq.* It also confined eligibility for certain farm benefits to crops not grown on converted wetlands. 16 U.S.C. 3821 *et seq.* And, in 1990, Congress directed the Secretary of Agriculture to establish a Wetlands Reserve Program, a voluntary program under which the Natural Resources Conservation Service (NRCS) provides technical and financial support to help landowners restore and protect wetlands. 16 U.S.C. 3837 *et seq.*

Acting under these and other authorities, the federal government has helped reduce the rate of decline in wetlands from 458,000 acres per year from the mid-1950s to the mid-1970s to 13,800 acres per year between 2004 and 2009. FWS, *Report to Congress: Status and*

Trends of Wetlands in the Conterminous United States, 2004 to 2009, at 40 (2011) (*2011 Status and Trends*); see also FWS, *Report to Congress: Status and Trends of Wetlands in the Conterminous United States, 1998 to 2004*, at 16 (2006) ("[a]gricultural conservation programs were responsible for most of the gross wetland restoration" between 1998 and 2004); NRCS, *News Release* (Dec. 11, 2012) (noting that, in two decades, over 11,000 landowners have participated in the Wetlands Reserve Program, restoring more than 2.6 million acres of wetlands), http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/newsroom/releases/?cid=stelprdb1075213.

2. Today, "development pressure is emerging as the largest cause of wetland loss." EPA, *Threats to Wetlands* 1 (Sept. 2001), http://water.epa.gov/type/wetlands/outreach/upload/threats_pr.pdf; see *2011 Status and Trends* 42 (identifying development and silviculture as the principal causes of wetland losses between 2004 and 2009). The Clean Water Act addresses that threat at the federal level. That statute prohibits "the discharge of any pollutant" into navigable waters. 33 U.S.C. 1311(a); see 33 U.S.C. 1362(6) (defining "pollutant" to include "dredged spoil" as well as "rock, sand," and "cellar dirt"); 33 U.S.C. 1362(7) (defining "navigable waters" as "the waters of the United States"). Section 404 of the Clean Water Act authorizes the Army Corps of Engineers (Corps) to "issue permits * * * for the discharge of dredged or fill material into the navigable waters." Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 884, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, § 67(a) and (b), 91 Stat. 1600 (33 U.S.C. 1344(a)).

The Corps has used its Clean Water Act permitting authority to protect against environmental losses to the

waters of the United States, including covered wetlands. See *Rapanos* v. *United States*, 547 U.S. 715, 742 (2006) (plurality op.); *id.* at 767 (Kennedy, J., concurring in the judgment). Under regulations promulgated pursuant to Section 404, the Corps requires permits to discharge dredged or fill materials into covered wetlands. 33 C.F.R. 323.3; see 33 C.F.R. 328.3(a)(2), (7) and (b) (defining "waters of the United States" to include specified wetlands). In deciding whether to grant any permit under its authority, the Corps undertakes a "public interest review," which considers numerous factors (including "flood hazards," "water quality," and "considerations of property ownership"), 33 C.F.R. 320.4(a)(1), and weighs the reasonably expected benefits of granting a permit against the reasonably foreseeable harms, *ibid.* See 33 C.F.R. 320.4(b)-(q) (explaining factors in detail).

In deciding whether to issue a permit for a proposed discharge of dredged or fill material into wetlands, the Corps evaluates whether the discharge would be consistent with guidelines jointly developed by the Corps and the EPA. 33 C.F.R. 320.2(f); see 40 C.F.R. 230.41. The Corps also generally considers whether mitigation measures, such as project modifications, could ameliorate the expected loss of natural resources. 33 C.F.R. 320.4(r). Pursuant to Congress's direction, see National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, § 314(b), 117 Stat. 1431, the Corps and the EPA jointly promulgated criteria for "compensatory mitigation" designed "to offset unavoidable impacts" to wetlands and other covered waters when the Corps issues permits under Section 404. See 33 C.F.R. 332.1(a); see generally 33 C.F.R. 332.1-332.8; 40 C.F.R. 230.91-230.98).

"Compensatory mitigation" under the Corps/EPA standards means "the restoration (reestablishment or rehabilitation), establishment (creation), enhancement," and "in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved." 33 C.F.R. 332.2. There are three mechanisms for compensatory mitigation. Under "permittee-responsible" mitigation, the landowner applying for a permit must undertake the required mitigation, either on the site of the project or offsite. 33 C.F.R. 332.3(b)(4), (5) and (6). Alternatively, a permittee can purchase credits from a "mitigation bank" or an "in-lieu fee program," which perform mitigation off-site to compensate for adverse impacts authorized by Corps-issued permits.[2] 33 C.F.R. 332.2, 332.3(b)(2) and (3), 332.8.

Although it is the permit applicant's responsibility to propose an appropriate compensatory mitigation option, mitigation banks and in-lieu fee programs are now the federal government's preferred options because they "usually involve consolidating compensatory mitigation projects where ecologically appropriate, consolidating resources, providing financial planning and scientific expertise (which often is not practical for permittee-responsible compensatory mitigation projects), reducing temporal losses of functions, and reducing uncertainty over project success." 33 C.F.R. 332.3(a)(1); see 33 C.F.R. 332.3(b)(2) and (3). But, regardless of the mechanism used, "the amount of required compensatory mitigation must be, to the extent practicable, sufficient

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[2] Mitigation banks and in-lieu fee programs have similar functions, but the rules governing their operation differ. See 33 C.F.R. 332.2, 332.8.

to replace lost aquatic resource functions." 33 C.F.R. 332.3(f)(1).

In determining the necessary amount of mitigation, the Corps considers "the method of compensatory mitigation" and "the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site." 33 C.F.R. 332.3(f)(2). Thus, for example, because preserving one acre of wetlands for the destruction of another would result in a net loss, "a mitigation ratio greater than one-to-one" is necessary and should include wetlands restoration, establishment, or enhancement to replace lost functions. *Ibid.*; 33 C.F.R. 332.3(h)(2).

3. Like most States, Florida has lost substantial portions of its wetlands. See FWS, *Florida's Wetlands: An Update on Status and Trends, 1985 to 1996*, at 7-8 (2005) (reporting that, of the 20.3 million acres of Florida wetlands existing in 1845, only 11.4 million survived in 1996). And like the federal government, Florida has taken steps to arrest that loss. Florida is divided into five water management districts. Fla. Stat. § 373.069(1) (1993).[3] Respondent is one. *Id.* § 373.069(1)(c). Florida law prohibits any person from dredging or filling surface waters without a permit. *Id.* §§ 373.413, 373.414. A permit may be issued only if the permitting agency determines that the proposed project is "not contrary to the public interest," considering various enumerated

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[3] All citations to the Florida Statutes are to the 1993 edition.

factors, such as the project's effect on the public health, safety, or welfare or the property of others, and conservation of fish and wildlife. *Id.* § 373.414(1) and (a).

At the time of the proposed project at issue in this case, a landowner wishing to fill or drain wetlands within respondent's jurisdiction was required to obtain two permits. See Fla. Admin. Code 17-312.030(1), 40C-4.041(1) and (2)(b)(10) (1994).[4] The first, a wetland resource management permit, would issue only upon the applicant's "reasonable assurance" that the development was consistent with the statutory public interest standard described above. *Id.* 17-312.080(2). The second, a permit for management and storage of surface waters, required the applicant to provide "reasonable assurance" that, among other things, the project would not adversely affect "[w]etland functions." *Id.* 40C-4.301(2)(a)(7). If the project was in a designated riparian wildlife habitat zone, an applicant for the second permit also had to provide "reasonable assurance" that the project would not "adversely affect" the wetlands-dependent species located on the project site. *Id.* 40C-41.063(5)(d)(1).

Florida law (now and at the time of the proposed project) does not, however, require outright denial of a permit if a proposed project does not satisfy those standards. Like the Corps' Section 404 regulations, Florida law allows an applicant to propose mitigation measures to ameliorate the effect of wetlands destruction that the project would cause. Fla. Admin. Code 17-312.060(10), 17-312.300 to 312.390, 40C-41.063(5)(d)(5). Mitigation proposals typically "involve the creation, enhancement or preservation" of wetlands. *Id.* 17-

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[4] All citations to the Florida Administrative Code are to the 1994 edition.

312.330. Respondent has a preference for creation and enhancement measures over preservation. J.A. Ex. 147, 152, 158-161. But Florida law does not require an applicant to undertake any particular form of mitigation, Fla. Admin. Code 17-312.300(4), and it remains the applicant's responsibility to propose appropriate mitigation, Fla. Stat. § 373.414(1)(b). Of course, an applicant who fails to propose any adequate mitigation measures when such measures are necessary to offset expected adverse effects is unlikely to receive a permit. See Fla. Admin. Code 17-312.300(3) and (5); see also *id.* 17-312.340(2) (mitigation must offset loss). For that reason, permitting agencies, such as respondent, may suggest alternative mitigation measures for the applicant's consideration. *Id.* 17-312.300(4).[5]

4. Coy A. Koontz, Sr., owned a 14.2-acre parcel of undeveloped land in Orange County, Florida. Pet. App. A5. "All but approximately 1.4 acres of the tract lies within a Riparian Habitat Protection Zone * * * of the Econlockhatchee River Hydrological Basin and is subject to jurisdiction of [respondent]." *Ibid.* Approximately 11 acres of the parcel were "wetlands bisected by a tributary of the Econlockhatchee River." J.A. 73. In 1994, petitioner applied for permits authorizing commercial development of 3.7 acres of the property. *Ibid.* The project required dredging and filling 3.4 acres of wetlands within the protection zone. J.A. 73-74. Accordingly, petitioner applied for the two necessary permits. J.A. 73; see p. 9, *supra*. To "minimiz[e]" the im-

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[5] Since the conduct at issue in this case, Florida has adopted the use of mitigation banks "to minimize mitigation uncertainty associated with traditional mitigation practices and provide greater assurance of mitigation success." J.A. Ex. 114; see Fla. Stat. § 373.4135; p. 7, *supra* (discussing mitigation banks under federal regulations).

pact of his proposed development, petitioner proposed "to perpetually preserve the balance of the site in its natural state" through a conservation easement dedicated to respondent. J.A. Ex. 13; see *id.* at 45, 89.

In considering petitioner's application, respondent's technical staff visited the property to evaluate the likely impact of the proposed project. J.A. Ex. 83-92. The staff determined that the wetlands "provide a diversity of habitat and food sources, and serve as an important refuge for a variety of wildlife species." *Id.* at 85. "Based on the high quality of the wetlands, and the impacts proposed to these areas," the staff concluded that petitioner's preservation proposal was insufficient to offset the expected loss of wetlands. *Id.* at 89. The staff "suggested" (*id.* at 87) various alternatives that would have reduced the project's impact to acceptable levels, including project design modification (*id.* at 87-88), reduction of the development's size (*id.* at 91-92; see also J.A. 74-75), and a variety of possible "off-site mitigation enhancement options," such as replacing 15 inoperative culverts in a state-owned nature preserve within the same river basin (J.A. Ex. 90; see *id.* at 90-91). Petitioner also could have combined his proposed conservation easement with off-site mitigation that might have required as little as the installation of one culvert and the removal of another. *Id.* at 91; J.A. 147. But petitioner "was unwilling to consider any additional mitigation options." J.A. Ex. 90; see J.A. 37. Accordingly, the technical staff concluded that petitioner's application failed to satisfy the permitting standards and recommended denying the permits. J.A. Ex. 92.

After a hearing, J.A. 21-43, respondent denied petitioner's applications, J.A. 44-54, 55-63. Noting the various mitigation alternatives the technical staff had sug-

gested that would have been sufficient to offset the loss of wetlands, J.A. 47-50, respondent concluded that petitioner's proposal to permanently preserve the remaining 11.25 acres, but without any offset for the loss of wetlands, was inadequate, J.A. 52, 62-63; see J.A. 49, 60 (finding that petitioner could have proposed alternative mitigation); see also J.A. 75 (petitioner's admission of same).

5. a. Under Florida law, as a party aggrieved by a decision of a water management district, petitioner could have sought judicial review of the decision denying the permits under the Florida Administrative Procedure Act. Fla. Stat. § 120.68. Instead of challenging the district's decision, however, petitioner brought an inverse condemnation action seeking compensation for respondent's alleged taking of petitioner's property without just compensation in violation of the Florida Constitution. J.A. 16-18; see Fla. Stat. § 373.617; see also *Department of Agric. & Consumer Servs.* v. *Polk*, 568 So. 2d 35, 38 (Fla. 1990) ("[T]he propriety of an agency's action may not be challenged in an inverse condemnation proceeding.").

The circuit court initially denied petitioner's regulatory-takings claim as unripe, but that ruling was reversed on appeal. See *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560 (Fla. Dist. Ct. App. 1998). On remand, the circuit court held that "the off-site mitigation conditions imposed upon [petitioner] by [respondent] resulted in a regulatory taking of [petitioner's] property." Pet. App. D1. Petitioner had argued that respondent's denial of his permit applications constituted a taking without compensation under an exaction-takings theory, relying on this Court's decisions in *Nollan* v. *California Coastal Commission*, 483

U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). Pet. App. D5, D7. Although the circuit court viewed those decisions as distinguishable, *id.* at D6-D7, it believed that application of *Nollan* and *Dolan* was mandated by the appellate court's prior remand order. *Id.* at D9-D11. Concluding that respondent had failed to demonstrate a "nexus" between off-site mitigation and the proposed development and did not show "rough proportionality" between the two, the circuit court held that respondent's denial resulted in a regulatory taking. *Id.* at D11; see *Nollan*, 483 U.S. at 837 (establishing "nexus" requirement); *Dolan*, 512 U.S. at 391 (establishing "rough proportionality" requirement). The court did not consider the other mitigation options suggested by respondent.

In light of that decision, respondent had three choices: It could issue the permits, pay monetary compensation, or modify its decision. Fla. Stat. § 373.617(3). Respondent chose to issue the permits authorizing petitioner's project with petitioner's proposed preservation of 11.25 acres as the only mitigation. J.A. 183; J.A. Ex. 5; see Resp. Br. 20 (stating that respondent made that choice in light of "the significant deterioration of the quality of the wetlands on petitioner's property" during the course of the litigation). The circuit court subsequently awarded petitioner $376,154 for "temporary takings damages" for the period between respondent's denial of the permits and its eventual grant. Pet. App. C2. That amount was based on rents petitioner lost as a result of respondent's permit denials. *Id.* at B20.

b. A Florida district court of appeal affirmed the monetary award in a divided decision. Pet. App. B1-B30. Concluding that *Nollan* and *Dolan* provided the appropriate framework for analyzing petitioner's tak-

ings claim, Pet. App. B8-B9, the appeals court affirmed the circuit court's judgment, upholding the determination that any mitigation in excess of petitioner's preservation proposal would "exceed the rough proportionality" requirement identified in *Dolan*. *Id.* at B10 n.5. The dissent would have held that no exaction had occurred because the permit had been denied and petitioner was not required to give up any interest in real property. *Id.* at B21-B23; see *id.* at B23 ("In this case, *nothing* was ever taken."). That did "not mean that [petitioner] was without a remedy," because petitioner could have challenged the validity of respondent's permit denial. *Id.* at B23.

c. The Supreme Court of Florida granted review to consider whether an exaction taking occurs under the United States or Florida Constitutions where the condition imposed on the landowner "does not involve the dedication of an interest in or over real property" or where "no permit is issued by the regulatory entity." Pet. App. A3; see *id.* at A2 ("This Court has previously interpreted the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution coextensively.").

Canvassing this Court's takings decisions, the Supreme Court of Florida observed that "regulatory takings challenges are governed by the standard articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)," which principally focuses on the economic impact of the regulation on the landowner, the extent to which the regulation interferes with the landowner's reasonable investment-backed expectations, and the character of the governmental action. Pet. App. A12; see 438 U.S. at 124. The court explained that this Court developed the theory of exaction takings in

Nollan and *Dolan* to address "government demands that landowners *dedicate easements* over their land to allow the public access across their property as a condition of obtaining development permits." *Id.* at A16. In the Florida court's view, however, this Court had declined to extend *Nollan* and *Dolan* beyond that specific context. *Id.* at A15-A17 (discussing *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), and *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005)). Accordingly, the court held that this Court's framework for exaction takings "is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed." *Id.* at A19.

Because respondent "did not condition approval of the permits on [petitioner's dedication of] any portion of his interest in real property in any way to public use," and because respondent "did not issue permits" and so "*nothing was ever taken from [petitioner]*," the Supreme Court of Florida reversed the lower court's judgment. Pet. App. A21.

SUMMARY OF ARGUMENT

The government's denial of a development permit can be the basis for a Fifth Amendment claim for compensation under *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), but not under an exaction-takings theory. Similarly, the exaction-takings framework does not provide the appropriate analysis for a taking premised on the government's conditioning of a permit on the expenditure of money.

I. Government regulation of private property may effect a regulatory taking if it is so onerous that it is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). Whether a regulation has such an effect usually is determined by considering the factors identified in *Penn Central*. See 438 U.S. at 124. This Court has employed a different analysis in cases in which the government granted a development permit that contained a condition requiring a landowner to forfeit a property right. Governments must provide just compensation for such "land-use exactions," *Lingle*, 544 U.S. at 546, unless the government demonstrates a nexus between the permit condition and the government's regulatory interest and shows that the condition is roughly proportional to the impact of the proposed project. *Dolan* v. *City of Tigard*, 512 U.S. 374, 386, 391 (1994).

A necessary precondition to any takings claim is government action that impairs some property interest. If the government denies a development permit because the landowner refuses to accept a condition that would constitute a per se taking, the landowner cannot state a claim for compensation for a deprivation that did not occur. In that situation, the government's permit denial may support a takings claim under *Penn Central*'s multi-factor analysis. But such a taking would not be a land-use exaction. A landowner also could challenge the validity of the permit condition, including by arguing that the government cannot constitutionally condition the permit on a requirement that the landowner dedicate a specified portion of his property to public use. Such a challenge to the validity of agency's decision,

however, "is logically prior to and distinct from the question whether a regulation effects a taking." *Lingle*, 544 U.S. at 543.

This Court's exaction-takings cases are fully consistent with the conclusion that government denial of a permit cannot support an exaction-takings claim for compensation. In *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), the government approved a permit that required the landowners to grant a public easement on their property, and that easement may have actually attached. And in *Dolan*, a condition requiring the dedication of property for public use would have attached had the landowner acted on the permit the government granted. By contrast, when the government denies a permit based on a landowner's refusal to accede to an impairment of a property right, the government neither takes that property right nor threatens to do so.

The Supreme Court of Florida's judgment is consistent with these principles. Reversal of that decision would impose inappropriate burdens and costs on state and federal land-use regulation and would not be in the interests of either landowners or the government.

II. Although the Fifth Amendment's requirement of just compensation is not limited to government appropriations of real property interests, a permit conditioned on an expenditure of money does not constitute an exaction taking. Under Justice Kennedy's approach and that of the four dissenting Justices in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), a requirement to pay money from unidentified sources does not qualify as a taking at all. See *id.* at 539-547; see *id.* at 554 (Breyer, J., dissenting). And under the plurality's approach in *Eastern Enterprises*, whether such a condition constitutes a

taking would be determined by applying the *Penn Central* framework, not the exaction-takings analysis of *Nollan* and *Dolan*. See *id.* at 522-537.

Petitioner contends that the Court should examine a permit condition requiring the expenditure of money as an exaction taking, because a requirement that petitioner dedicate money to a public use would be a per se taking if not imposed as a condition of a permit. Petitioner's argument is incorrect. Governments routinely require individuals to spend money for public purposes through the imposition of taxes and fees, yet it is settled that taxes and fees do not qualify as takings. Moreover, because landowners have the ability to challenge the government's requirement to spend money on other grounds, there is no need to expand the exaction-takings doctrine to protect landowners' interests.

ARGUMENT

I. PETITIONER'S TAKINGS CLAIM BASED ON RESPONDENT'S DENIAL OF A PERMIT TO FILL WETLANDS IS PROPERLY ANALYZED UNDER THE *PENN CENTRAL* FRAMEWORK

A. *Penn Central* Provides The General Standards For Analyzing A Regulatory-Takings Claim

The Just Compensation Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, see *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226 (1897), provides that private property shall not "be taken for public use, without just compensation." The purpose of that restriction is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012) (quoting *Armstrong* v. *United States*, 364

U.S. 40, 49 (1960)). "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). If the government engages in such a per se taking, "it has a categorical duty to compensate the former owner." *Arkansas Game*, 133 S. Ct. at 518 (quoting *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)).

Outside that paradigmatic setting, this Court has recognized that government regulation of property that "goes too far" constitutes a taking requiring just compensation. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). But regulation of economic affairs and land use is extensive, and virtually all such regulation adversely affects some members of the community. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992) (quoting *Mahon*, 260 U.S. at 413); see also *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 627 (2001) ("The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions."). Two types of regulatory takings, nonetheless, are sufficiently distinct and significant in their impact that this Court has deemed them per se takings: regulation that imposes "a permanent physical invasion of [a landowner's] property," and regulation that "completely deprive[s] an owner of '*all* economically beneficial us[e]' of the property." *Lingle*, 544 U.S. at 538 (discussing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458

U.S. 419 (1982), and quoting *Lucas*, 505 U.S. at 1019) (first two alterations added).

Other regulations that interfere with the use of property may effect a taking if their application is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), announced standards for identifying such regulation. See *Lingle*, 544 U.S. at 539. Under that "essentially ad hoc," multifactor analysis, courts consider "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. Also relevant "is the character of the governmental action," such as whether the interference stems from "a physical invasion by government" or, instead, from a "public program adjusting the benefits and burdens of economic life to promote the common good." *Ibid.*; see *ibid.* (explaining that the former is more likely to constitute a taking than the latter).

This Court has employed a different analysis in the context of development permits granted on the condition "that a landowner dedicate an easement allowing public access to her property." *Lingle*, 544 U.S. at 546 (describing *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994)). Such "land-use exactions," *ibid.*, involve the impairments of property interests that would constitute appropriations requiring just compensation if the government imposed them outside the permitting context. *Id.* at 546-547; see *Dolan*, 512 U.S. at 385 (requirement that landowner deed portions of property to city);

Nollan, 483 U.S. at 828 (public easement). But unlike a per se taking under *Loretto* or *Lucas*, a land-use exaction does not result from unilateral government action. The exaction occurs only if the landowner seeks and obtains authorization to undertake conduct that the government properly may regulate through its police power. See *Dolan*, 512 U.S. at 384-385, 387; *Nollan*, 483 U.S. at 836.

Under the "well-settled doctrine of 'unconstitutional conditions,'" *Dolan*, 512 U.S. at 385, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected" rights, *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006). Applying that doctrine to land-use exactions, this Court held that the government may not deny a landowner "the right to receive just compensation when property is taken for a public use," *Dolan*, 512 U.S. at 385, unless the government establishes a nexus between the government's legitimate regulatory interest "and the permit condition exacted by the [government]," *id.* at 386 (discussing *Nollan*, 483 U.S. at 837), and unless the government demonstrates, through an "individualized determination," that "the required dedication" is roughly proportional "both in nature and extent to the impact of the proposed development," *id.* at 391; see *id.* at 391 n.8 (explaining that "the burden [is] on the [government] to justify the required dedication").

B. An Exaction-Takings Claim Requires The Actual Appropriation Of Property

1. A necessary precondition to any claim seeking just compensation is government action that actually impairs some property interest to such an extent that it constitutes a taking. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294

(1981) (no taking where plaintiffs failed to "identif[y] any property in which [plaintiffs] have an interest that has allegedly been taken"); *Boston Chamber of Commerce* v. *City of Boston*, 217 U.S. 189, 194 (1910) (rejecting contention that "the city could be made to pay for a loss of theoretical creation, suffered by no one in fact"). Indeed, it is the value of the property right taken that provides the measure of compensation owed. See *Brown* v. *Legal Found.*, 538 U.S. 216, 235-236 (2003); *Boston Chamber*, 217 U.S. at 195.

Where the government denies a development permit because a landowner declined to accede to a condition (such as a public easement) that would impair a property right (such as the right to exclude others), the landowner may not state a claim for just compensation based on the impairment of the property interest that would have occurred under the proposed condition, because that impairment did not actually occur. The Just Compensation Clause imposes a payment obligation on the government "when property *is* taken," *Dolan*, 512 U.S. at 385 (emphasis added), not when the government *proposes* to take property but does not. *Cf.* Pet. Br. 15, 24 (urging adoption of just compensation requirement when "government *attempts* to confiscate property") (capitalization altered and emphasis added).[6]

A landowner denied a permit in these circumstances may have a cognizable claim for just compensation. But

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[6] Petitioner claims the right "to compensation for the substantial cost incurred making unrelated [*sic*] public improvements." Pet. Br. 11; see *id.* at 15. It is telling, however, that petitioner did not seek, and the circuit court did not award, compensation for any such costs, because they were never incurred. Instead, the circuit court based its compensation award on a calculation of lost rent on petitioner's *own* property after the permits were denied. Pet. App. C1-C2, B20.

any such claim must be based on the impact of the permit denial itself on the use of the property, not on the value of a property right that would have been lost if (as never actually happened) the permit had been issued and the development proceeded subject to that condition. Thus, the landowner could argue that the government's denial of a development permit deprived him of "all economically beneficial use" of the property. *Lucas*, 505 U.S. at 1027. Or the landowner could argue that the permit denial had such a severe economic impact and sufficiently interfered with distinct investment-backed expectations that, under the multi-factor *Penn Central* analysis, a taking requiring just compensation had occurred. See, *e.g.*, *Penn Central*, 438 U.S. at 104-105.[7]

Alternatively, the aggrieved landowner would have the option of challenging the validity of the permit denial, arguing that the agency's action was inconsistent with state or federal statutory or constitutional law. See, *e.g.*, Fla. Stat. § 120.68(7)(e); *Lingle*, 544 U.S. at 548-549 (Kennedy, J., concurring). In such a proceeding, for example, the landowner could challenge the validity of the permit denial on the basis of the unconstitutional-conditions rationale that informs the exaction-takings doctrine, as occurred in *Parks* v. *Watson*, 716 F.2d 646 (9th Cir. 1983), and *McKain* v. *Toledo City Plan Commission*, 270 N.E.2d 370 (Ohio Ct. App. 1971),

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[7] There is a dispute about whether petitioner waived or forfeited any claim under *Penn Central*. See Resp. Br. 33 n.15. Respondent acknowledges that the issue of waiver or forfeiture should be resolved by the Florida courts, should this Court affirm. *Ibid.* There appears to be no dispute that petitioner has waived any *Lucas* claim. See J.A. 76, 163. In any event, such claims generally would be available to a landowner denied a permit on the basis of his rejection of a condition that would qualify as an exaction, had it actually been consummated.

cases cited by *Dolan*, see 512 U.S. at 389 n.7 and 391, and mistakenly relied upon by petitioner to support his claim for monetary compensation, Pet. Br. 34-35. See also Resp. Br. 29-30.

But a challenge to the underlying validity of the permit denial is quite different from a claim for just compensation for an exaction that was never actually imposed. See *Lingle*, 544 U.S. at 543 (noting that the question of a regulation's underlying validity "is logically prior to and distinct from the question whether a regulation effects a taking"). Should a court determine that a permit denial is unconstitutional or otherwise unlawful, including on the ground that a proposed condition was unconstitutional, the proper remedy would be a declaration to that effect and (if necessary) an injunction prohibiting the state from continuing to deny the permit on the unlawful ground.[8] See, *Parks*, 716 F.2d at 654-655; *McKain*, 270 N.E.2d at 375; see also *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 410 (1963).

2. The conclusion that the government's denial of a development permit cannot be the basis of a claim for monetary compensation premised on an alleged exaction taking that never occurred is consistent with this Court's *Nollan* and *Dolan* decisions.

In *Nollan*, the government approved a development permit on beachfront property, authorizing the landowners to demolish an existing bungalow and replace it with a three-bedroom house. 483 U.S. at 828-829. The permit was conditioned on the requirement that the

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[8] Thus, while we agree with petitioner (Pet. Br. 34) that a court properly may "invalidate[]" an unconstitutional condition underlying a government's decision to deny a permit, petitioner is mistaken in suggesting (*id.* at 33-39) that such a denial can be the basis for a claim seeking compensation for an exaction that was never imposed.

landowners "allow the public an easement to pass across a portion of their property" along the beach. *Id.* at 828. Although the owners challenged the condition, *id.* at 828-829, they tore down the bungalow and built the house while their suit was pending, *id.* at 829-830. Thus, the public easement, which was a condition of the permit, may have attached. See *Lambert* v. *City & Cnty. of San Francisco*, 529 U.S. 1045, 1048 (1999) (Scalia, J., dissenting from denial of certiorari) ("[I]n *Nollan* there was arguably a completed taking of an easement" because "the homeowner had completed construction that had been conditioned upon conveyance of the easement.").

In *Dolan*, the government had approved issuance of the landowner's development permit, subject to the condition that the landowner dedicate a portion of her property to public uses. 512 U.S. at 379-380. Unlike in *Nollan*, the landowner in *Dolan* did not develop her land in reliance on the permit while her challenge to the condition was pending. See *id.* at 394 (referring to landowner's "proposed development"). Nevertheless, "there was at least a threatened taking of an easement": "if the landowner *had* gone ahead with her contemplated expansion plans the easement would have attached." *Lambert*, 529 U.S. at 1048 (Scalia, J., dissenting from denial of certiorari).

By contrast, where the government denies a permit because the landowner refuses to accede to a condition providing for conveyance of an easement, "there is neither a taking nor a threatened taking," *Lambert*, 529 U.S. at 1048 (Scalia, J., dissenting from denial of certiorari), of a property interest in the easement. Because the government denied the permit, it has no cognizable interest in the property that would have been acquired if

the permit instead had been granted and development proceeded. Thus, if the property owner develops the land notwithstanding the permit denial, the government would have no basis to enforce the condition (*e.g.*, by exercising rights under an easement). Its only recourse would be to "sue to enjoin and punish," *ibid.*, the landowner's development on the ground that it was undertaken without the necessary permit. And, as noted above, the landowner, for his part, could challenge the permit denial as a regulatory taking under *Penn Central* (or *Lucas*) or could seek to enjoin the government's imposition of the assertedly invalid condition. See pp. 22-24, *supra*.[9]

3. The Supreme Court of Florida believed that this Court's decisions in *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), and *Lingle* affirmatively foreclosed reliance on an exaction-takings theory in any respect in this case, reasoning that those decisions "specifically limited the scope of *Nollan* and *Dolan* to those exactions that involved the dedica-

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[9] A government agency would not be open to any exactions-takings claim if it denied a development permit outright, without proposing any condition. Any takings claim would have to rely on *Penn Central* or *Lucas*, based on the impact of the permit denial itself. In a situation in which an outright denial of the permit would not constitute a taking under *Penn Central* or *Lucas*, it is not evident why an agency's bare approval of the permit application subject to an unconstitutional condition would give rise to a claim for monetary compensation, as opposed to a suit to have the unlawful agency action set aside, because the mere approval without actual implementation of the condition would not constitute a transfer of any property interest. A basis for compensation would arise only after the transfer. The Court need not address that issue here, however, because the permit in this case was denied.

tion of real property for a public use," Pet. App. A19, in circumstances where "the regulatory entities *issued* the permits sought with the objected-to exactions imposed" *id.* at A18. Although, in our view, petitioner's exaction-takings claim for compensation should be rejected, we do not believe that *Del Monte Dunes* and *Lingle* themselves squarely rejected such a claim.

In *Del Monte Dunes*, a "city, in a series of repeated rejections, denied proposals to develop [a] property, each time imposing more rigorous demands on the developers." 526 U.S. at 694. Among the conditions the city imposed was a requirement that the landowner set aside "public open space." *Del Monte Dunes*, 526 U.S. at 696. The landowner sued for compensation, alleging a taking. *Id.* at 698. A jury returned a verdict in its favor, and the court of appeals affirmed. *Id.* at 701. In evaluating the propriety of submitting the takings question to the jury, this Court considered the court of appeals' conclusion that the jury's verdict could be upheld because the city's conditions on development were not roughly proportional to its regulatory interests. *Id.* at 702. This Court held that the court of appeals had erred in applying an exaction-takings standard because that standard "was not designed to address, and is not readily applicable to, the * * * questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development." *Id.* at 703.

The Florida court understood *Del Monte Dunes* to have held that a denial of a permit cannot be the basis for any exaction-takings claim. Pet. App. A15-A16, A18-A19. The landowner in *Del Monte Dunes*, however, had expressly repudiated an exaction-takings claim. See, *e.g.*, 526 U.S. at 705 ("Del Monte Dunes partnership did

not file this lawsuit because they were complaining about giving the public the beach[.] * * * One-third [of the] property is going to be given away to the public use forever. That's not what we filed the lawsuit about.") (quoting trial transcript) (first alteration added). This Court's statement that the exaction-takings standard "was not designed to address" a challenge based on a city's "denial of development," *id.* at 703, is best understood as an explanation that the exaction-takings framework does not apply in a suit challenging the denial of a development permit if the landowner does not challenge a proposed condition as a taking of an interest in property.

Lingle explained that *Nollan* and *Dolan* "involved" takings challenges "to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." 544 U.S. at 546. The Florida court understood that statement as suggesting that exaction-takings claims are limited to circumstances where the government actually imposes the condition by issuing a development permit. Pet. App. A16, A18-A19. But *Lingle*'s bare description of the particular action challenged in *Nollan* and *Dolan* need not be read to have actually imposed that limitation on the exaction-takings theory by implication.

Although the Supreme Court of Florida's decision thus was not squarely controlled by *Del Monte Dunes* and *Lingle*, that court nevertheless correctly held, for the reasons given above, see pp. 21-24, *supra*, that a landowner states a claim for monetary compensation on an exaction-takings theory "only when the regulatory agency actually issues the permit sought, thereby ren-

dering the owner's interest in the real property subject to the dedication imposed." Pet. App. A19.

4. Adoption of petitioner's contrary argument (Pet. Br. 29-39) would impose inappropriate burdens and costs on state and federal land-use and environmental regulation and would not be in the interests of either landowners or the government.

State governments may use their police powers to enact reasonable land-use regulation, without providing for compensation. See *Lucas*, 505 U.S. at 1024-1026. Landowners have a right, subject to that reasonable regulation, to make use of their property, including by developing it. See, *e.g.*, *Palazzolo*, 533 U.S. at 627. In the usual suit for just compensation, the burden is on the landowner to establish that the government's conduct so interferes with his property rights as to constitute a taking. See, *e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. 52, 60 (1989). In an exaction case, because the government's appropriation would constitute a per se taking if made outside the permit context, this Court has placed the burden on the government to establish the nexus and rough proportionality necessary to avoid liability for a taking. *Dolan*, 512 U.S. at 391 & n.8.

Placing the burden on the government in takings suits arising from the denial of development permits would have undesirable consequences. In considering permit applications involving wetlands destruction, for example, the federal government and Florida assist landowners seeking to develop their property by helping to indentify appropriate mitigation measures. See 33 C.F.R. 332.4(a); Fla. Admin. Code 17-312.300(4). If this Court were to apply the exaction-takings framework to permit denials premised on a landowner's decision not to accept a condition suggested by the government, the

foreseeable consequence would be that government agencies would refrain from assisting permit applicants to identify acceptable mitigation measures. See generally Pet. App. A20; Br. of Amici Nat'l Governors Ass'n et al. 14-15. Agencies would do so because a regulatory-takings challenge to an agency's outright denial of a permit would remain subject to review under the less stringent *Penn Central* standard, which, in addition, places the burden on the claimant. Such an outcome would not be in the interest of either landowners or governments.[10]

II. CONDITIONING THE GRANT OF A PERMIT ON AN OBLIGATION TO SPEND MONEY DOES NOT CONSTITUTE AN EXACTION TAKING

A. Imposition Of An Obligation To Spend Money Supports A Takings Claim, If At All, Only Under *Penn Central*

The Fifth Amendment's requirement of the payment of just compensation is not limited to government appropriations of private interests in real property. See, *e.g.*, *Phillips* v. *Washington Legal Found.*, 524 U.S. 156 (1998) (rights to funds in specific bank accounts); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984) (rights to intangible property). This Court has not decided whether a requirement to pay money from unidentified sources can ever be the basis of a takings claim.

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[10] The consequences of imposing the exactions-takings framework in a case such as this would be especially severe. Respondent identified a variety of measures, any one of which would have been sufficient to mitigate the adverse impact of petitioner's proposed development, and some of which involved only a modification of petitioner's project with no mitigation beyond that offered by petitioner. See p. 11, *supra*.

But if such a claim is cognizable, it would be governed by *Penn Central*.

In *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), the Court considered a challenge to the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.* That statute imposed retroactive liability on coal operators, requiring them to fund the health benefits of certain retired coal miners. *Id.* at 514-515 (plurality op.). Analyzing the imposition of liability on the particular operator before the Court, a plurality of the Court concluded that application of the statute to the particular operator had effected a taking under *Penn Central* for which just compensation was required. *Id.* at 522-537 (concluding that the retroactive liability had a substantial economic impact and interfered with the coal operators' reasonable investment-backed expectations, and that the character of the governmental action was unusual).

Five Justices, however, rejected that analysis. Justice Kennedy concurred in the judgment. *Eastern Enters.*, 524 U.S. at 539. He concluded that, as a "retroactive law[] of great severity," the Coal Act violated due process. *Id.* at 549; see *id.* at 547-550. But Justice Kennedy disagreed with the plurality's view that the statute effected a taking. *Id.* at 540. He concluded that a regulatory takings claim is cognizable only "where specific and identified properties or property rights [are] alleged" to have been appropriated. *Id.* at 541. Because a statute that "neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms" does not interfere with property interests protected by the Just Compensation Clause, Justice Kennedy would have held that the Coal Act did not effect a taking. *Id.* at 543. The four dissent-

ing justices agreed with that analysis of the takings issue. *Id.* at 554 (Breyer, J., dissenting, joined by three other Justices).

Even assuming that the imposition of a monetary liability could constitute a taking, however, under this Court's precedent a takings claim of that sort would be analyzed under *Penn Central* rather than under the framework established for exaction takings. Under the approach of either Justice Kennedy and Justice Breyer's dissent in *Eastern Enterprises*, on the one hand, or the plurality on the other hand, a claim that a development permit conditioned on the expenditure of money constitutes a taking would not be analyzed under exaction-takings principles. Under Justice Kennedy's approach, the condition would not constitute a taking at all, because it does not involve the impairment of rights to specific property or property interests. See *Eastern Enters.*, 524 U.S. at 541; see also *Sperry Corp.*, 493 U.S. at 62 n.9 ("It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible."). And under the plurality's approach, a court would analyze the takings claim under *Penn Central*. See *Eastern Enters.*, 524 U.S. at 523-524.

B. Petitioner's Argument To The Contrary Lacks Merit

The exaction-takings framework applies only to permit conditions "involv[ing] dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings." *Lingle*, 544 U.S. at 547. Petitioner contends that a requirement that a landowner "dedicate a sum of his money to a public use," Pet. Br. 15, as a condition of receiving a permit satisfies that requirement, *id.* at 40. But petitioner's submission, "if accepted, would prove too much." *Connolly* v. *Pen-*

sion Benefit Guar. Corp., 475 U.S. 211, 222-223 (1986) (rejecting similarly broad argument that "a statutory liability to a private party always constitutes an uncompensated taking").

Governments routinely require individuals to spend money for public purposes, through the imposition of taxes or fees—such as excise taxes, special assessments, user fees, and development fees—yet it has been settled that "taxation for a public purpose, however great, [is not] the taking of private property for public use, in the sense of the Constitution." *County of Mobile* v. *Kimball*, 102 U.S. 691, 703 (1881). This Court has similarly upheld reasonable fees against takings claims. See *Sperry Corp.*, 493 U.S. at 63. It cannot be, then, that any government requirement that an individual "dedicate a sum of his money to a public use," Pet. Br. 15, would be a "dedication[] of property so onerous that * * * [it] would be deemed [a] *per se* physical taking[]," *Lingle*, 544 U.S. at 547. Petitioner thus has not identified an impairment of a property interest that, if imposed outside the permitting context, would constitute an appropriation requiring just compensation. But such a showing is an essential precondition for application of the exaction-takings framework.

While exaction takings do not provide the proper framework for analyzing a requirement to expend funds as a condition of obtaining a development permit, that does not mean that such a requirement is shielded from scrutiny. A landowner may challenge the validity of the requirement under state or federal law, arguing, for example, that the required expenditure is unauthorized, is arbitrary or capricious under administrative law standards such as those in the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or imposes an unconstitutional

condition. See pp. 21-24, *supra*. A landowner also might in some circumstances seek to advance a regulatory-takings claim under *Penn Central*, on the theory that the fairness of the expenditure could be considered in light of the landowner's economic interests and investment-backed expectations, and the character of the government's action. Because landowners may seek redress through these various other avenues, there is no need to reformulate or extend the exaction-takings theory to accommodate challenges to permits conditioned on the payment of funds.

CONCLUSION

The Court should affirm the judgment of the Supreme Court of Florida.

Respectfully submitted.

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DECEMBER 2012

AMICUS CURIAE BRIEF

No. 11-1447

IN THE

Supreme Court of the United States

COY A. KOONTZ, JR.,
Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

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BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE [1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; former

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[1] Peter Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to protect the constitutional rights of all Americans, including property owners, regardless of political correctness.

STATEMENT OF THE CASE

Petitioner Coy Koontz purchased a vacant 14.9 acre lot in 1972, located at a busy intersection of two major highways in Orange County, Florida. Florida J.A. 187; Pet. Cert. App. A-5 & n.2; J.A. 27-28. Subsequent to that purchase, the State enacted a statute governing land use on property containing wetlands and uplands including fish and wildlife habitat. J.A. 27, 67.

Under that statute and implementing regulations, the State designated a Riparian Habitat Protection Zone that included all but 1.4 acres of Koontz's property. That Zone was overseen by Respondent St. Johns River Water Management District.

The law and implementing regulations did not require that Koontz's property be found to contain any riparian habitat before it was included in the Zone, and the property actually contained no such habitat. Pet. Cert. App. D-3. The State had run a ditch across the property that had long since drained any wetlands that may have once existed on the land. J.A. 116, 137. Habitat protection experts inspecting

the property found standing water only in ruts along an easement road owned by the State, and used by a power company. J.A. 117-18, 142-43. Puddles in such ruts hardly amounted to wetlands. Moreover, the property had long since been rendered inhospitable to wildlife because of surrounding residential and commercial development, road construction, and other government approved projects, including the busy intersection of two major highways where the property is located. Pet. Cert. App. D-3; J.A. 101-02, 111-19, 137-39. Nevertheless, the designation created a legal presumption that any land use in the Zone was harmful to protected habitat, which meant that affected landowners within the Zone, like Koontz, had to obtain environmental permits for land uses from the Respondent District. J.A. 33.

In 1994, Petitioner Koontz consequently applied to the District for permits to develop 3.7 acres of his property within the Zone. Pet. Cert. App. A-5—A-6, D-4. But Koontz was informed by the District staff that they would recommend denial of the permit applications unless he agreed to finance restoration and enhancement of at least 50 acres of wetlands on District owned land miles from and unrelated to his proposed development, in addition to donating the remaining 11 acres, or 75%, of his property to the District. Pet. Cert. App. A-6, D-4; J.A. 26, 70-71, 103-104, 109, 122-23.

The District staff conceded that they had not conducted any surveys of Koontz's proposed development to determine the presence of any wildlife or riparian habitat, nor did they have any

evidence to rebut Koontz's own experts and their studies showing no harm to wildlife or riparian habitat from his proposed development. J.A. 146. But they informed Koontz that since his property was within the designated Zone, any development at all was considered harmful to riparian habitat without further evidence, and that he could consequently not develop his land at all without complying with the conditions the District required to obtain the permits. Pet. Cert. App. A-5 – 6; J.A. 33, 39, 107.

The District's Governing Board subsequently held a hearing on Koontz's permit applications, where he agreed to donate the 11 remaining acres, or 75%, of his property to the District, but he refused to spend any additional funds to finance restoration and enhancement of District property miles away from, and unrelated to, his proposed development. Pet. Cert. App. A-6, D-4; J.A. 29-30, 107, 111, 119-20, 139. The District consequently denied his permits. Pet. Cert. App. D-4; J.A. 70-71. The District conceded, "the denials were based exclusively on the fact that [Koontz] would not provide additional mitigation to offset impacts from the proposed project," meaning financing for the District's demanded restoration and enhancement of the District's own unrelated property miles away. J.A. 70. But if Koontz had agreed to such financing, "the exact project [he] proposed would have been permitted." J.A. 71. Without the permits, however, Koontz could not use his own property. Pet. Cert. App. 5-6; J.A. 70-71.

Koontz filed this action in 1994 against the District in Florida state court under a state law, seeking damages for an uncompensated taking. J.A.

4-65. The state statute provided for "monetary damages and other relief" for "an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla.Stat.Sect. 373.617(2). The trial court entered judgment for Koontz, citing *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 854 P.2d 437 (Ore. 1993).

In response to the judgment, the District agreed to approve Koontz's permit applications without the unlawful conditions. Pet. Cert. App. A-7. While the court ordered the District to grant the permits by June, 2004, the District did not do so until December, 2005, more than 11 years after it denied the permit applications. Pet. Cert. App. A-7; J.A. 183. As a result, the trial court subsequently granted Koontz damages for the District's unlawful denial of his permit applications during this extended time. Pet. Cert. App. C-2.

On appeal, the District did not argue or provide any evidence to counter the trial court's factual findings that no essential nexus or rough proportionality existed between the District's demands or exactions on the permits Koontz sought and the impact of Koontz's proposed project for which the permits were requested, as required by *Nollan* and *Dolan*. So those trial court findings were not even disputed on appeal. As the appeals court said, "The District makes no challenge to the evidentiary foundation for [the trial court's] factual findings." Pet. Cert. App. B-6. The appeals court consequently upheld the trial court's judgment against the District. Pet. Cert. App. B-10.

But the Florida Supreme Court reversed. Pet. Cert. App. A-21. That Court held that *Nollan* and *Dolan* only apply to exactions or takings of real property, and not to monetary demands or conditions, which are apparently unrestrained and without limit in that Court's view. Pet. Cert. App. A-15 – A-16. Moreover, the Florida Supreme Court held that the District's actions were not unconstitutional because the District had not issued any permits when the trial court's judgment was rendered, and so "nothing was ever taken from Mr. Koontz." Pet. Cert. App. A-21.

This Court granted certiorari on October 5, 2012.

SUMMARY OF ARGUMENT

The District's denial of the permits requested by Koontz was not even in compliance with constitutionally required Due Process of Law.

But denying the permits on the grounds that the District did was also a straightforward violation of the Takings Clause. By its own admission, the District did not deny the permits because of the adverse effects of the proposed development on riparian habitat and wildlife.

Rather, the record indisputably shows that the permits were denied because Koontz refused to provide payoffs in the form of payments for the restoration and enhancement of unrelated property owned by the District miles away from Koontz's proposed development on his own property. This is

exactly the kind of corruption this Court sought to prohibit in *Nollan*.

Nollan and *Dolan* provide that compensation does not have to be paid for a permit restriction on Koontz's property with an essential nexus to the public purpose of banning development on that property, and with a rough proportionality to the adverse impact of Koontz's proposed development on the governmental interest in his property. But the condition that Koontz pay for the cost of restoration and enhancement of an unrelated property miles away from Koontz's own proposed development has no nexus to Koontz's proposed development on his own property, or any rough proportionality to any adverse effect of Koontz's proposed development on his own property. So the District must pay compensation for denying Koontz the development permits under the Takings Clause, as the District does not qualify for the exceptions to that provided by *Nollan* and *Dolan*.

The Florida Supreme Court held that *Nollan* and *Dolan* do not apply to this case because the District had not issued any permits when the trial court's judgment was rendered, and so "nothing was ever taken from Mr. Koontz." Pet. Cert. App. A-21. The Court said that in both *Nollan* and *Dolan* "the regulatory entities *issued* the permits sought with the objected-to exactions imposed." Pet. Cert. App. A-18.

But that is flatly wrong according to both the *Nollan* and *Dolan* decisions. In both cases, the permits were never issued, according to those very

decisions themselves. But that did not stop the challenge from going forward in both cases, and this Court from issuing its landmark decision in *Nollan*, and the Oregon Supreme Court from issuing its landmark decision in *Dolan*.

The Florida Supreme Court also held that *Nollan* and *Dolan* only applied to required dedication of real property interests to obtain requested permits, but not to required expenditures of personal property such as cash, as in the District's proposed condition on Koontz's permit for the restoration and enhancement of unrelated District property miles from Koontz's proposed development.

The Takings Clause is embodied in the Fifth Amendment to the U.S. Constitution, stating: "nor shall private property be taken for public use, without just compensation." That language is not limited to real property, but applies to all private property, which would include personal property, such as cash.

The same is true of the language and rationale of this Court's decision in *Nollan*. This and the plain language of the Takings Clause is why the courts have long held that the Clause applies to all property, not just real property.

Moreover, if monetary conditions on permits are allowed without limitation, that would open an enormous loophole to evade the Takings Clause. The landowner can simply be required to make a payment to the governing authority equal to the value of the property taken to gain the permit. The government

can then use that money to pay the compensation under the Takings Clause. This is the ultimate reason why such monetary expenditure conditions on permits cannot be allowed without limitation, for that would effectively nullify the Takings Clause requirement that just compensation be paid for property taken for public use.

ARGUMENT

I. THE DISTRICT'S DENIAL OF KOONTZ'S PERMIT APPLICATIONS WAS UNCONSTITUTIONAL

The District's denial of the permits requested by Koontz was not even in compliance with constitutionally required Due Process of Law.

Not only was there never any showing that Koontz's property even included any riparian habitat in the first place. The District was so arrogantly confident that it had the power to take Koontz's property that it held it did not even have to respond to Koontz's evidence that his proposed development would not harm any riparian habitat or wildlife. This does not even comply with the basic requirements of Due Process of Law. E.g. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976);

But denying the permits on the grounds that the District did was also a straightforward violation of the Takings Clause. By its own admission, the District did not deny the permits because of the adverse effects of the proposed development on riparian habitat and wildlife. The record shows that

the District even denied that it had to provide evidence to that effect.

Rather, the record indisputably shows that the permits were denied because Koontz refused to provide payoffs in the form of payments for the restoration and enhancement of unrelated property owned by the District miles away from Koontz's proposed development on his own property. If only Koontz had agreed to such financing, the record indisputably shows, "the exact project [he] proposed would have been permitted." J.A. 71.

This is exactly the kind of corruption this Court sought to prohibit in *Nollan*. As the Court said there,

> "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 contribution in order to shout fire is a lesser restriction on speech than an outright

> ban, it would not pass constitutional muster. Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose into something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A. 2d 12, 14-15 (1981)."

483 U.S. at 837.

In the present case, the governmental purpose of the development ban on Koontz's property is to protect riparian habitat and wildlife on that property. But the purpose of the condition that Koontz can go ahead with his development as long as he bears the expense of restoration and enhancement of unrelated property owned by the District miles away from Koontz's proposed development on his own property is merely to get the money for that unrelated restoration and enhancement. That is an out-and-out plan of extortion to get the money from Koontz for another government purpose unrelated to his own development. That is very much like, and precisely analogous to, requiring a $100 payment to shout fire

in a crowded theater, which "would not pass constitutional muster."

The end result is that Koontz was denied effective use of his land, but without payment of compensation. Even if that was for the valid public purpose of protecting riparian habitat and wildlife, the District would still have to pay compensation under the Takings Clause of the U.S. Constitution, just like it would if it was taking Koontz's land for the valid public purpose of building a bridge across a river. *Nollan* and *Dolan* provide that compensation does not have to be paid for a permit restriction on Koontz's property with an essential nexus to the public purpose of banning development on that property, and with a rough proportionality to the adverse impact of Koontz's proposed development on the governmental interest in his property. But the condition that Koontz pay for the cost of restoration and enhancement of an unrelated property miles away from Koontz's own proposed development has no nexus to Koontz's proposed development on his own property, or any rough proportionality to any adverse effect of Koontz's proposed development on his own property. So the District must pay compensation for denying Koontz the development permits under the Takings Clause, as the District does not qualify for the exceptions to that provided by *Nollan* and *Dolan*.

II. THE LIMITATIONS ON PERMIT RESTRICTIONS PROVIDED IN *NOLLAN* AND *DOLAN* APPLY TO THIS CASE.

A. The Limitations on Permit Conditions in Nollan and Dolan do not depend on whether the permit was ever actually issued.

The Florida Supreme Court held that *Nollan* and *Dolan* do not apply to this case because the District had not issued any permits when the trial court's judgment was rendered, and so "nothing was ever taken from Mr. Koontz." Pet. Cert. App. A-21. Since no permits were issued, the *Nollan* and *Dolan* limitations on permit conditions could not have been violated, the Court tried to reason. This extremely confused decision took no notice of the fact that without the permits Koontz could not develop his property at all, or of the unconstitutional reasons for the permit denial, nor of the fact that Koontz had never received any compensation for this taking of his property.

But the Court's fallacy was not limited to that error. The Court said that in both *Nollan* and *Dolan* "the regulatory entities *issued* the permits sought with the objected-to exactions imposed." Pet. Cert. App. A-18. But that is flatly wrong according to both the *Nollan* and *Dolan* decisions.

In *Nollan*, the California Coastal Commission issued only a ruling that the Commission would grant the requested permit only if the Nollans first dedicated an easement to the public. *Nollan*, 483 U.S. at 828. The Commission's ruling stated,

> *Prior to the issuance of the Coastal Development Permit*, the applicants shall record, in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject properties in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other."

Brief of Appellants at 5, *Nollan*, 483 U.S. 825 (No. 86-133), 1986 U.S. S.Ct. Briefs LEXIS 1382, **10 (quoting Joint Appendix at 34, *Nollan*, 483 U.S. 825 (no. 86-133)).

The Nollans brought their action challenging the constitutionality of the Commission's ruling without ever recording the deed restriction required by the Commission's ruling for the permit to issue. *Nollan*, 483 U.S. at 828-29. So the challenged permit and its conditions were never issued in *Nollan* just as they were not issued in this case. But that did not stop the Nollans' challenge from going forward, or this Court from issuing its landmark decision in that case.

The same was true in *Dolan*. There, the city agency ruled that it would issue a requested building permit only if Ms. Dolan, the owner of the property, first dedicated flood-plain and bicycle-path easements to the city. The city's ruling stated,

> "*Prior to the issuance of building permits*] [t]he applicant shall dedicate to the City as greenway all portions of the site that fall

> within the 100 year floodplain [of Fanno Creek] (i.e. all portions of property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary."

Dolan, 20 Or. LUBA at 413, 199 Ore. Land Use Bd. App. LEXIS 316, at *4 (emphasis added). But, as in the Nollans' case, Dolan never granted the easements to the city required for the requested permits to be granted. So Dolan's case also went forward, and was decided in the courts, without the requested permit ever being issued either.

And that was the exact same as happened in this case. The permits requested by Koontz were never issued, as the Florida Supreme Court recognized in fact. But that is exactly the same as happened in *Nollan* and *Dolan*, not a reason for those precedents not to apply in this case.

As Justices Scalia, Kennedy and Thomas argued in urging that this Court should have granted certiorari in the one case where the permit had not been issued,

> "[T]he court's refusal [below] to apply *Nollan* and *Dolan* might rest on the distinction that it drew between the grant of a permit subject to an unlawful condition and the denial of a permit when an unconstitutional condition is not met. From one standpoint, of course, such a distinction makes no sense. The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the

> permit process an 'out-and-out plan of extortion." There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference."

Lambert v. City & County of San Francisco, 529 U.S. 1045 (2000). *Accord: Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983)(rejected claim that the permit was denied and, therefore, no property had been taken); *Goss v. City of Little Rock*, 151 F.3d 861 (8th Cir. 1998)(rejected argument that *Nollan* and *Dolan* did not apply to permit denials, where landowner's objection to unlawful permit condition was grounds for denial); *McCain v. Toledo City Plan Comm'n*, 270 N.E. 370 (Ohio Ct. App. 1971)(cited by Dolan, denial of a permit because of refusal to dedicate property not sufficiently related to proposed development was unconstitional confiscation of property without compensation); *Jacobsville Developers East, LLC v. Warrick County*, 905 N.E. 2d 1034 (Ind. Ct. App. 2009)(Landowner has cause of action where permit application is denied because landowner would not agree to excessive condition); *William J. Jones Ins. Trust v. Ft. Smith*, 731 F. Supp. 912 (W.D. Ark. 1990)(enjoined city from requiring dedication of easement as precondition for permit approval where easement violated nexus rule).

B. The Limitations on Permit Conditions in Nollan and Dolan Are Not Restricted to Exactions of Real Property, But Apply to All Private Property.

The Florida Supreme Court also held that *Nollan* and *Dolan* only applied to required dedication of real property interests to obtain requested permits, such as easements, or the contribution of Koontz's remaining 11 acres to a conservation trust overseen by the District in the present case. But the Court held that the cases did not apply to required expenditures of personal property such as cash, as in the District's proposed condition on Koontz's permit for the restoration and enhancement of unrelated District property miles from Koontz's proposed development.

That would leave no restraint on the unrelated payoffs the government could demand for any development or use permits for any property. That leaves the door wide open to the "out-and-out extortion" the Supreme Court sought to prohibit in *Nollan*.

The Takings Clause is embodied in the Fifth Amendment to the U.S. Constitution, stating: "nor shall private property be taken for public use, without just compensation." That language is not limited to real property, but applies to all private property.

The same is true of the language and rationale of this Court's decision in *Nollan*. Nothing in *Nollan* limits that ruling to permit conditions relating to real property. Indeed, the rationale of *Nollan*, to prevent "out-and-out extortion" applies equally as well to personal property such as cash, as can be seen in the present case. There is no reason for the District to require Koontz to bear the costs for restoration and

enhancement of the District's own unrelated property miles away from Koontz's proposed development, except for out-and-out extortion, requiring Koontz alone to bear a cost that in the public interest should rightly be shared by everyone. *Armstrong v. United States*, 364 U.S. 40, 49 (1960)(the premise of the Takings Clause is that property owners should not be forced to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Without the limitations in *Nollan* applying to personal property as well as real property, there would be no limit to such extortion.

This and the plain language of the Takings Clause is why the courts have long held that the Clause applies to all property, not just real property. In *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1993), this Court vacated the decision of a California state court that monetary exactions on the grant of a permit were not covered by the limitations of *Nollan*, and remanded for further consideration under *Dolan*. On that remand, the California Supreme Court held that the nexus and proportionality limitations of *Nollan* and *Dolan* apply equally to protect personal property such as cash, as well as real property. *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996). The court said, "[I]t matters little whether the local land use permit authority demands the actual *conveyance* of property or the *payment* of a monetary exaction." 911 P.2d at 444.

Similarly, in *San Remo Hotel v. City of & County of San Francisco*, 41 P. 3d 87, 102 (Cal. 2002), the California Supreme Court later said, "Though the

members of this court disagreed on various parts of the analysis, we unanimously held that this ad hoc monetary exaction *was* subject to *Nollan / Dolan* scrutiny." The Texas Supreme Court later further confirmed the correct rule in holding that there is no reason why "[monetary] exactions should be analyzed differently than dedications [of real property] in determining whether there has been a taking." *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W. 3d 620, 635 (Tex. 2004). *Accord:* Carlos A. Ball and Laurie Reynolds, 47 Wm. & Mary L. Rev. 1513, 1569 (2006)("[W]e do not believe that the land-monetary distinction serves as an effective proxy for the likelihood that the government overreached in imposing an exaction. Both types of exactions raise the possibility that the government may improperly leverage its police power in order to receive benefits from the owner without paying compensation.").

Moreover, if a condition on a permit requiring monetary expenditures does not fall within *Nollan / Dolan*, and no permit is issued because the landowner refuses to make the monetary expenditures, that does not absolve the government from paying compensation for the taking of the landowner's property, as permissible conditions under *Nollan / Dolan* do. The government still must pay compensation for property that is taken because no permit is issued, and the landowner is consequently deprived of use of his property. So Koontz would still be entitled to compensation for his property if the monetary condition on his permit does not fall within the conditions allowed under *Nollan / Dolan*.

But if monetary conditions on permits are allowed without limitation, that would open an enormous loophole to evade the Takings Clause. The landowner can simply be required to make a payment to the governing authority equal to the value of the property taken to gain the permit. The government can then use that money to pay the compensation under the Takings Clause. This is the ultimate reason why such monetary expenditure conditions on permits cannot be allowed without limitation, for that would effectively nullify the Takings Clause requirement that just compensation be paid for property taken for public use.

CONCLUSION

For all of the foregoing reasons, the decision of the Florida Supreme Court below should be reversed.

DATED: November 28, 2012

Respectfully Submitted,

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AMICUS CURIAE BRIEF

No. 11-1447

In The
Supreme Court of the United States

COY A. KOONTZ, JR.,
Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,
Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Florida

BRIEF OF THE AMERICAN PLANNING ASSOCIATION, THE CITY OF NEW YORK, AND THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Bruce Wiener & David Dagon, *Wetlands Regulation and Mitigation After the Florida Environmental Reorganization Act of 1993*, 8 J. Land Use & Envtl. L. 521 (1993) 12

INTEREST OF *AMICI CURIAE*[1]

The American Planning Association ("APA") is a nonprofit public interest and research organization founded in 1909 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning – including physical, economic, and community planning – at the local, regional, state, and national levels. The APA's mission is to encourage planning that will contribute to the public's well-being today, as well as to the well-being of future generations, by developing sustainable and healthy communities and environments. The APA has 47 chapters and represents approximately 40,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues, nationwide.

The APA has filed *amicus* briefs on behalf of planning interests for decades, including in such cases as *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte*

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *Amici* state no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to its preparation or submission.

Dunes at Monterey, Ltd., 526 U.S. 687 (1999); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Rapanos v. United States*, 547 U.S. 715 (2006); and *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010).

Amicus City of New York ("NYC") is a municipal corporation in New York State. Under New York State law and the New York City Charter, NYC adopts and administers zoning regulations and grants zoning special permits and variances pursuant to those regulations. NYC also administers environmental review procedures, which involve the fashioning of mitigation measures to address environmental harms, as well as a number of environmental permitting procedures affecting the use of land. NYC has a longstanding interest in this Court's takings jurisprudence, having been the respondent in two of this Court's most important takings cases, *Penn Central v. New York City*, 438 U.S. 104 (1978), and *Loretto v. Teleprompter*, 458 U.S. 419 (1982).

Amicus National Trust for Historic Preservation in the United States ("National Trust") was chartered by Congress in 1949 as a nonprofit organization for the purpose of furthering the historic preservation policies of the United States and to "facilitate public participation" in the

preservation of our nation's heritage. 16 U.S.C. §§ 468-468d. In addition, Congress has designated the Chairman of the National Trust as a member of the federal Advisory Council on Historic Preservation, which is responsible for overseeing federal agency compliance with Section 106 of the National Historic Preservation Act. *Id.* § 470i(a)(8). The mission of the National Trust is to provide leadership, education, and advocacy to save America's diverse historic places and revitalize our communities. With some 750,000 members and supporters nationwide, the National Trust carries out a wide range of programs and activities to advance the public's interest in historic preservation. These activities include the promotion of public policies, legal tools, and tax incentives that support the preservation of America's heritage. The National Trust often acts as an advocate in the administrative review process for permitting actions at the federal, state, and local levels, where mitigation measures – similar to those present in the instant case – are often used to avoid, minimize, and mitigate harm to historic and cultural resources.

The National Trust frequently participates, both as *amicus curiae* and as a party, in judicial proceedings relating to the enforcement or application of laws that promote the preservation of historic places. The National Trust has previously participated as *amicus curiae* before this Court in 13 takings cases: *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte*

Dunes at Monterey, Ltd., 526 U.S. 687 (1999); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 431 U.S. 104 (1978).

Amici bring a vital perspective to regulatory takings issues and have a strong interest in ensuring that takings jurisprudence remains appropriately tailored so that it does not undermine legitimate planning activities and other community protections. Because Petitioner's theory presents a grave threat to workable, collaborative land use planning, *Amici* respectfully request that this Court affirm the Florida Supreme Court's decision.

SUMMARY OF ARGUMENT

Each day in countless communities across the country, land use planning and zoning officials negotiate with developers over permit conditions that promote responsible development – including, as in this case, conditions that mitigate related environmental harms. These negotiations typically end with agreed-upon conditions, tailored to each

unique proposal, that allow development to go forward, while also providing mitigating benefits to account for the very real costs development can impose upon the community at large.

Mr. Koontz asks this Court to allow developers to cut off negotiations and state a cognizable federal takings claim any time the developer believes that land use officials are asking for too much during the course of this negotiation process.[2] Expanding the purview of the Takings Clause, and, in particular, the fact-intensive inquiries required under this Court's rulings in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in this manner would be a disaster both for the land use planning process and for the federal judiciary, which would find itself, for no good reason, flooded with cases that put judges in control over the workaday operations of land use regulators.

The facts of this case illustrate why *Nollan* and *Dolan* cannot be applied coherently in the context of failed negotiations. Both *Nollan* and *Dolan* concerned finalized conditions – instances in which a permit was approved and specific conditions were attached. Under Mr. Koontz's theory, any failed negotiation could serve as the basis of a constitutional challenge based on little

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[2] In 2000, Coy Koontz, Sr., died. At that point, his son, Coy Koontz, Jr., became the personal representative of the estate and the Plaintiff/Petitioner in this action. Throughout, we simply refer to both Petitioner and Coy Koontz, Sr., collectively, as "Mr. Koontz."

more than the informal offers of a government agency. Here, the District proffered Mr. Koontz a long list of potential mitigation options that would have complied with state guidelines for projects involving the destruction of wetlands – some calling for on-site mitigation and others for off-site mitigation.[3] Indeed, contrary to Mr. Koontz's hyperbolic and unsupportable rhetoric about the District engaging in a "plan of extortion," Pet. Br. 5, 12, the record demonstrates that the District bent over backwards to find a way to allow Mr. Koontz's project to go forward – with Mr. Koontz cutting off negotiations before the parties could settle upon a single, concrete mitigation plan that complied with state guidelines. In such circumstances, it is unclear which conditions a court should scrutinize under *Nollan* and *Dolan* – all conditions proposed during the parties' negotiations, only those on the table when talks break down, or all conceivable conditions that could have been suggested by either party? No matter the answer, extending *Nollan* and *Dolan* to cover such situations would be unworkable for both public officials and judges.

As important, the doctrinal foundation of *Nollan* and *Dolan* – this Court's doctrine of unconstitutional conditions – simply does not

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[3] *Dolan* itself demonstrates that there is nothing talismanic about whether the required mitigation occurs on-site or off-site. *See* 512 U.S. at 394 ("If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property *or elsewhere*.") (emphasis added).

permit the application of their tests to the suggested conditions at issue in this case. As the first step in any unconstitutional conditions inquiry, a claimant must demonstrate that he or she is being asked to give up a clear constitutional right in exchange for a discretionary benefit. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958). In the takings context, that requires the claimant to show that the permit condition would be a *per se* taking if required by the government unilaterally. *See Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831. However, none of the conditions proposed by the District constitutes a *per se* taking, and thus Mr. Koontz's claim fails even this threshold requirement under both *Nollan* and *Dolan*. Furthermore, applying *Nollan* and *Dolan* outside the context of *per se* takings would once again blur the clear line that this Court drew between the Takings Clause and the Due Process Clause in *Lingle v. Chevron*, 544 U.S. 528 (2005), when it overturned *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and reaffirmed the limited reach of *Nollan* and *Dolan*.

Nevertheless, Mr. Koontz suggests that this Court must expand *Nollan* and *Dolan* far outside of their appropriate doctrinal application. Otherwise, according to Mr. Koontz, landowners would be left with no claim to relief when a negotiation over a land use permit breaks down and a permit is denied. *See* Pet. Br. 13, 25, 44-45. That is simply not the case. Instead, even without extending *Nollan* and *Dolan* to cover such situations, landowners have several other potential claims available under both the Takings Clause and the

Fourteenth Amendment. The problem for Mr. Koontz is that the factual record in this case does not support a finding of a constitutional violation under any of these theories.

ARGUMENT

I. THE SPECIALIZED TESTS THIS COURT DEVELOPED IN *NOLLAN* AND *DOLAN* CANNOT BE EXTENDED TO OFFERS OR SUGGESTED OFFERS BY THE DISTRICT DURING A PERMIT NEGOTIATION PROCESS.

A. *Nollan* And *Dolan* Cannot Be Applied To This Case Because Mr. Koontz Broke Off Negotiations Before Any Particular Condition Was Demanded By The District.

Mr. Koontz portrays the District's review of his permit application in Orwellian terms. *See* Pet. Br. 23 ("[T]he District sought to . . . cloak within the processing of Mr. Koontz's permit application a 'plan of extortion.' . . . The District wanted his land *and* his money.").[4] The actual process – which involved a District scientist who had never recommended a permit denial in *more than one thousand prior cases*, Trial Tr. 234, and offers by the District that Mr. Koontz's own engineer

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[4] Mr. Koontz applied for both a management and storage of surface water permit and a wetland resource permit. Resp't Br. 6-7. Throughout, we simply refer to these applications, collectively, as Mr. Koontz's "permit application."

described as "excellent," Trial Tr. 62 – bears no resemblance to the one described by Mr. Koontz.[5] An accurate account of the record in this case illustrates why *Nollan* and *Dolan* are unworkable in the context of failed negotiations.

In 1994, Coy Koontz sought to develop an environmentally valuable tract of land located within a Riparian Habitat Protection Zone in Florida. Resp't Br. 9-10.[6] Development of this property required a permit from the St. Johns River Water Management District. *Id.*

Elizabeth Johnson, a District scientist, supervised the processing of Mr. Koontz's application. Trial Tr. 68. Johnson had handled more than one thousand such applications since joining the District in 1988, and, prior to Mr. Koontz's case, had never recommended a permit denial. Trial Tr. 234. In 1993, Johnson toured the proposed development site with one of Mr. Koontz's consultants. Trial Tr. 69. From there, the parties tried to negotiate a deal that would both permit Mr. Koontz to develop his property and offset related harms to protected wetlands. Trial Tr. 17-18.

Contrary to Mr. Koontz's account of these negotiations, the District's discretion was far from "limitless" or "unfettered." Pet. Br. 25, 44. Instead, it was guided and constrained throughout by state

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[5] "Trial Tr." refers to the transcript of Mr. Koontz's liability trial.

[6] "Dist. Hr'g Tr." refers to the transcript of Mr. Koontz's hearing before the District's Governing Board.

law – guidelines and constraints rooted in scientific best practices and intended to respond to decades of unchecked wetlands destruction, both in Florida and nationwide. Resp't Br. 8-13. Furthermore, the District never issued Mr. Koontz an "ultimatum" or a "'take it or leave it' demand." Pet. Br. 22, 44. Instead, from the beginning of the parties' negotiations all the way until the day of Mr. Koontz's permit hearing, the District presented him with proposals that were designed to find a way to "get to yes," Pet. App. E-1 to -3 – even though it was always *Mr. Koontz's* burden, not the District's, to come up with mitigation options that complied with state law, Fla. Stat. § 373.414(1)(b).

Throughout the parties' negotiations, the District made one thing absolutely clear: Mr. Koontz's only offer – an offer to put a conservation easement on his remaining 11 acres of wetlands – was not sufficient, on its own, to meet state guidelines. Resp't Br. 10; Trial Tr. 25. The reason for this was simple: by definition, Mr. Koontz's proposal would have resulted in a net loss of wetlands within the river basin, as he was seeking to destroy 3.4 acres of protected wetlands in exchange for agreeing not to develop 11 additional acres of already-protected wetlands – a net loss of 3.4 acres. *Id.*

This result – the net loss of wetlands – is precisely why such permit-for-conservation-easement exchanges are the most undesirable form of mitigation from the State's perspective. Resp't Br. 11. Indeed, the state guidelines applicable in this case required that proposals like Mr. Koontz's,

which placed already-protected wetlands into a conservation easement, only be pursued *after* considering possible mitigation through wetlands creation or enhancement – each of which more directly increased wetlands functions within the river basin as a whole. R. 1704. Indeed, the guidelines themselves reminded regulators that, "historically," the State had only accepted proposals for a conservation easement "*after* on-site wetland creation and/or enhancement" were deemed insufficient. R. 1703 (emphasis added).

The State's preference for mitigation through wetlands creation or enhancement was reflected in the mitigation ratios established by the state guidelines, which called for much higher ratios when applicants – like Mr. Koontz – proposed merely placing a conservation easement on already-protected wetlands. Resp't Br. at 12. Indeed, Florida, like other states, required ratios ranging from 10:1 to 100:1 for such proposals, depending on the quality of the wetlands involved. *Id.*; *cf.* Wash. State Dep't of Ecology et al., 06-06-011a, *Wetland Mitigation in Washington State – Part I: Agency Policies and Guidance* 77 (2006) ("[Mitigation] [r]atios for preservation as the sole means of mitigation shall generally start at 20:1."); Jonathan Silverstein, *Taking Wetlands to the Bank: The Role of Wetland Mitigation Banking in a Comprehensive Approach to Wetlands Protection*, 22 B.C. Envtl. Aff. L. Rev. 129, 157 (1994) (noting that the Environmental Protection Agency Region IV (southeast) issued draft guidance that established mitigation ratios of 10:1 for wetlands preservation). The State required much lower ratios – ratios

starting at less than 1:1 – when the applicant offered to create new wetlands or enhance existing wetlands. Resp't Br. at 12.

At a minimum, then, for his permit application to be approved without running afoul of state guidelines, Mr. Koontz would have had to place 34 acres of wetlands into a conservation easement in order to compensate for destroying 3.4 acres of wetlands through new development. Because Mr. Koontz only had 11 acres of wetlands remaining on-site, Trial Tr. 240, 245-46, he had to reduce the size of his development proposal, conduct some form of on-site or off-site mitigation, or find a more suitable site for his proposed development in order to comply with state guidelines and offset the environmental harms associated with his proposed development, Trial Tr. 240-41.

With these constraints in mind, the District provided Mr. Koontz with a long (and open-ended) list of options for both satisfying state guidelines and allowing his project to go forward. Resp't Br. at 13-14.[7] First, the parties discussed reducing the scale of Mr. Koontz's development, allowing him to meet the State's suggested mitigation ratio solely by placing his remaining property into a

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[7] At no point did the District even request that Mr. Koontz undertake wetlands creation, typically the most expensive form of mitigation and which, according to estimates from the mid-1990s, could cost up to $75,000 per acre. Bruce Wiener & David Dagon, *Wetlands Regulation and Mitigation After the Florida Environmental Reorganization Act of 1993*, 8 J. Land Use & Envtl. L. 521, 575 (1993).

conservation easement. Resp't Br. 13-14. In addition, the District proposed that Mr. Koontz could further reduce environmental harms on-site by constructing a subsurface storm-water management system and replacing side-slope areas with stem walls. *Id.* Mr. Koontz rejected each of these options, calling the proposal to construct a subsurface storm-water management system, in particular, "too costly," though he provided no evidence to support this assertion. R. 1616.

Finally, following up on this suggestion, and prior to Mr. Koontz's hearing, the District also went so far as to provide Mr. Koontz with two specific off-site mitigation options, each designed to comply with state guidelines: 1) a proposal to restore and enhance at least 50 acres of wetlands on a parcel 4.5 miles away by replacing culverts and plugging ditches; and 2) another to perform similar off-site mitigation at a site 7 miles away solely by plugging ditches. Resp't Br. 14-15.

Mr. Koontz suggests that these conditions were onerous, even tyrannical. However, both the hearing and trial records demonstrate otherwise, and, in any event, he cannot prove a taking by selectively attacking a subset of the alternatives that the District offered in negotiations. While the details of these off-site mitigation options were never fully settled, a District staff member testified at Mr. Koontz's hearing that the related costs "would be very minimal." Dist. Hr'g Tr. 7. And, later, at trial, a District scientist testified that the District was simply asking Mr. Koontz to install one culvert and remove another, which would

restore and enhance 50 acres off-site and, in conjunction with his proposed conservation easement, would have permitted Mr. Koontz to go forward with his entire development project. Resp't Br. 15. In fact, at trial, Mr. Koontz's own engineer, Brian Fogle, *agreed* that the off-site mitigation proposed by the District was "relatively minimal," requiring "a couple of culverts" and "only a couple thousand additional [dollars]." Trial Tr. 60. In the end, Fogle recommended that Mr. Koontz accept the District's offer to perform off-site mitigation – an offer that he called "excellent." Trial Tr. 62.

All told, therefore, the District proposed three different ways in which Mr. Koontz could have developed his property while also satisfying state guidelines: by reducing the size of his development proposal; by performing on-site remediation to improve the functioning of his own wetlands: or performing "minimal" off-site mitigation to restore other wetlands in the basin. Mr. Koontz does not attempt to demonstrate that *all* of these alternatives violated the *Nollan* and *Dolan* requirements (even if those requirements applied in this setting). Instead, he seeks to further prolong this litigation by attempting to show that a subset of the alternatives offered by the District do not satisfy *Nollan* and *Dolan*.

At the permit hearing, a District Board member asked Mr. Koontz's representative whether he "would be willing to go back with the [District] staff over the next month and renegotiate" to try to come up with a set of conditions that worked for both parties – especially since the parties had yet

to settle on a single, concrete mitigation plan. Dist. Hr'g Tr. 23; Resp't Br. at 15. However, Mr. Koontz declined, rejecting each of the District's proposals out of hand, Dist. Hr'g Tr. 23, even before his representative could get additional details from the District and even as Mr. Koontz himself understood that the related costs of such mitigation "would be minimal," Trial Tr. 65. The District then denied Mr. Koontz's permit, concluding that his proposed development would adversely affect the area's fish and wildlife without sufficient mitigation. Resp't Br. 15-16; Pet. App. A-6. Mr. Koontz then filed this lawsuit in state court.

Now, Mr. Koontz asks this Court to allow him to turn his state court lawsuit into a federal case and have this Court and lower courts across the country apply the fact-intensive inquiry of *Nollan* and *Dolan* to failed land use negotiations. *Nollan* and *Dolan* concerned finalized conditions – instances in which a permit was approved and specific conditions were attached. At that point, the relevant landowners knew precisely what was required of them, and this Court knew which conditions to scrutinize. Under Mr. Koontz's theory, any failed negotiation could serve as the basis of a constitutional challenge based on nothing more than the informal offers of a government agency. For instance, in this case, the trial court found that the off-site mitigation options offered by the District had "not been precisely prescribed" and that the cost of the proposed off-site mitigation "was not definite," ranging anywhere between $90,000 and $150,000, with some additional evidence that "it could cost as little as $10,000."

Pet. App. D-4. And this was only one of at least three alternatives proposed by the District, including options that relied solely upon on-site mitigation – options that were largely ignored by the courts below. In such circumstances, should courts apply *Nollan* and *Dolan* to all of the conditions that were mentioned during the negotiation process, only those on the table when the parties finally decided to end negotiations, or all conceivable conditions that could have been suggested by either party under state guidelines?

The answer is strongly suggested by the very analysis a court would need to perform if *Nollan* and *Dolan* govern in this setting. *Dolan*, in particular, would require an "individualized determination" that the relevant condition "is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. In applying that test, this Court focused on the findings made at the time that the Tigard City Council formally imposed that condition, and asked whether the City had quantified its findings, and gone so far as to determine whether the condition "will, or is likely to," offset some of the impact. *Id.* at 395-96. This is hardly the type of analysis that a public agency should be required to perform for every alternative that it merely raises during the course of its negotiations with landowners.

In the end, extending *Nollan* and *Dolan* in this manner – in effect, constitutionalizing all run-of-the-mill land use negotiations – risks grinding both

the land use process and the judicial system itself to a halt.[8] As important, such a result would be inconsistent with the text and history of the Takings Clause, as well as this Court's takings jurisprudence.

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[8] Petitioner and *Amici* rely heavily on a study of land use planners conducted by Anne Carlson and Daniel Pollak. *See* Pet. Br. 27 (citing Anne E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 103 (2001)); Amicus Br. for Owners' Counsel of America 15-18 (same); Amicus Br. for the Land Use Institute, Ltd. 12-14 (same). According to their argument, the Carlson-Pollak study supports Petitioner's argument that *Nollan* and *Dolan* can easily be extended to cover this case. However, that very study contradicts rather than supports Petitioner's argument. Indeed, Carlson and Pollak caution that *Nollan* and *Dolan* are *already* problematic in cases in which the government is seeking to protect the environment – let alone *after* extending those rules to cover new situations, such as failed negotiations. *See* Carlson & Pollak, *supra*, at 134-36. As Carlson and Pollak explain:

> In principle, local governments have the authority to mitigate environmental impacts as an exercise of the police power. . . . Nevertheless, the impacts of development on these public goods may be hard to quantify or even define with precision, thus *making nexus and rough proportionality difficult to quantify*.

Id. at 135 (emphasis added). In the end, Carlson and Pollak conclude that, although the ultimate effects of *Nollan* and *Dolan* on environmental projects are "not yet known," "a logical extension of [their] findings" is that if localities do not find alternative funding sources, they will face "greater amounts of hardscape," "less open space," and fewer environmental projects overall. *Id.* at 136.

B. Under The Doctrine Of Unconstitutional Conditions, *Nollan* And *Dolan* Can Only Be Applied In Special Cases, Such As Land Dedications, In Which The Condition Would Be A *Per Se* Taking If Unilaterally Imposed.

The text of the Takings Clause is narrow, applying only when property is "taken" by the government, and when the plaintiff seeks "just compensation" for that alleged taking. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.'") (citations omitted); *id.* at 1028 n.15 ("[E]arly constitutional theorists did not believe that the Takings Clause embraced regulations of property at all."). While this Court has, since *Mahon*, allowed takings challenges when government regulation "goes too far," every test of regulatory takings liability "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 537, 539. For this reason, the *Dolan* Court described its rough proportionality test as an "outer limit[]" on "the commendable task of land use planning," 512 U.S. at 396, and this Court has repeatedly reaffirmed

the limited reach of *Nollan* and *Dolan* to land use decisions conditioning approval of a development permit on the dedication of real property. *See Lingle*, 544 U.S. at 546 (explaining that *Nollan* and *Dolan* involved "Fifth Amendment takings challenges to adjudicative land use exactions – specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit"); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (reaffirming that *Dolan*'s rough proportionality test applies only in the "special context of exactions . . . conditioning approval of development on the dedication of property to public use").[9]

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[9] Petitioner argues that this case involves a straightforward permit denial based "solely" on Mr. Koontz's refusal to "accede" to the District's supposed "demand" that he "dedicate his money to a public use." Pet. Br. 38-39. In so doing, Petitioner draws on lower court cases to argue that *Nollan* and *Dolan* can easily be extended to cover such situations. Pet. Br. 34-39. However, despite Petitioner's attempt to simplify the facts of this case, the District's permit decision was *not* based "solely" on Mr. Koontz's refusal to accept one of the District's off-site mitigation proposals. Instead, the District provided Mr. Koontz with a bevy of mitigation options designed to comply with state guidelines – some involving off-site mitigation, others involving exclusively on-site measures – each of which would have allowed Mr. Koontz to go forward with his development project. *See* Pet. App. E-1 to -3; R. 1625-29. As such, unlike the lower court decisions discussed in Petitioner's brief, no single, fixed demand was on the table when Mr. Koontz decided to cut off negotiations with the District and bring this lawsuit. *Compare* Section I.A, *supra* (outlining the various mitigation proposals offered by the District in this case), *with Goss v. City of Little Rock*, 151 F.3d 861 (8th Cir. 1998) (applying *Nollan* and *Dolan* to a rezoning

These limits on the application of *Nollan* and *Dolan* are fixed by the rooting of these cases in the doctrine of unconstitutional conditions. Under this doctrine, "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government." *Dolan*, 512 U.S. at 385. When considering the constitutionality of a challenged condition, courts follow a two-step approach. First, they ask whether the claimant is being asked to give up a clear constitutional right in exchange for a discretionary benefit. *See, e.g.*, *Speiser*, 357 U.S. at 518-19. Second, if a constitutional right *is* being taken away, then they ask whether that burden is justified. *See, e.g.*, *id.* at 521-29. Relevant to the issues raised by this case, unless and until a claimant can show a condition that would be a *per se* taking if unilaterally imposed, a court cannot proceed to step two of the *Nollan* and *Dolan* inquiry – the application of the "substantial nexus" and "rough proportionality" tests – which determines whether a deprivation of constitutional rights is justified.

In both *Nollan* and *Dolan*, the challenged conditions – a public right of passage in *Nollan* and a dedication of land in *Dolan* – were paradigmatic examples of *per se* takings. *See Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831, *cf. Lingle*, 544 U.S. at 537 ("The paradigmatic taking requiring just

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request denial involving a single, well-defined government demand for a land dedication).

compensation is a direct government appropriation or physical invasion of private property."). Indeed, both *Nollan* and *Dolan* emphasized the fact that the challenged condition eliminated the right of the landowner to exclude others from his or her real property – "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan*, 512 U.S. at 384 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)); *Nollan*, 483 U.S. at 831 (same).

In *Dolan*, for instance, the landowner applied for permission to expand her plumbing and electronic supply stores. 512 U.S. at 379. As a condition of the permit, the city required the landowner to dedicate a strip of land behind her store in a floodplain along nearby Fanno Creek. *Id.* The land would have been used as part of a public bike path, walkway, and greenway. *Id.* at 379-80. The purpose of the dedication was to reduce traffic congestion on nearby roads, as well as flood risks along the creek. *Id.* at 381-82.

In applying the doctrine of unconstitutional conditions, the *Dolan* Court began by asking whether the challenged condition deprived a landowner of a constitutional right. *Id.* at 384. The *Dolan* Court concluded that it did, observing that "had the city simply required petitioner to dedicate the strip of land along the Fanno Creek for public use, rather than condition the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." *Id.* at 384.

Since the condition itself would have violated the Takings Clause if unilaterally imposed, the *Dolan* Court then proceeded to step two of the unconstitutional conditions inquiry and considered whether such a burden was justified. *Id.* at 391. In particular, it focused on whether the challenged condition – which compelled the dedication of land without just compensation – was "roughly proportional" to the harm anticipated from the proposed development. *Id.* at 391-96. In concluding that the challenged condition failed this "rough proportionality" test, the *Dolan* Court observed that the city failed to explain "why a public greenway, as opposed to a private one, was required in the interest of flood control." *Id.* at 393.

This Court applied a similar analysis in *Nollan*. There, the Nollans sought permission to replace a small oceanfront bungalow with a much larger home. 483 U.S. at 827-28. The permit included a condition requiring the Nollans to dedicate a public easement along the beach. *Id.* at 828. Because the larger house would reduce the public's view of the ocean from the coastal highway, the State argued that the dedication would help address this "psychological barrier." *Id.* at 835.

Once again, this Court rooted its analysis – albeit implicitly – in the doctrine of unconstitutional conditions. The *Nollan* Court began by asking whether the challenged condition deprived the landowner of a constitutional right. *Id.* at 831. As in *Dolan*, the *Nollan* Court concluded that it had, explaining in words echoing *Dolan*:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on agreeing to do so, we have no doubt there would have been a taking.

Id.

Since the condition itself would have violated the Takings Clause if unilaterally imposed, the *Nollan* Court next considered whether such a burden was justified. The *Nollan* Court concluded that it was not, explaining that it was "quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Id.* at 838.

Whereas *Nollan* and *Dolan* illustrate the application of the doctrine of unconstitutional conditions in the land use planning context, this Court's ruling in *Yee v. City of Escondido*, 503 U.S. 519 (1992), illustrates the limits of this doctrine. In *Yee*, the owners of mobile home parks challenged a rent control law and restrictions on evictions. The Yees argued, among other things, that it would be unconstitutional for the government to condition their right to rent the property on the forfeiture of their right to receive compensation for a physical occupation. The Court flatly rejected the argument

because there was no compelled occupation of their land:

> Petitioners argue that if they have to leave the mobile home park business in order to avoid the strictures of the Escondido ordinance, their ability to rent property has in fact been conditioned on such a forfeiture. This argument fails at its base, however, because there has simply been no compelled physical occupation giving rise to a right to compensation that petitioners could have forfeited.

Id. at 531-532. Distinguishing *Nollan*, the Court observed that if the city had required the Yees to rent the property to others in the first place, then the city might "lack the power to condition [the Yees'] ability to run mobile home parks on their waiver of this right." *Id.* at 532. But, because the ordinance "does not effect a physical taking in the first place," the Yees' unconstitutional-conditions argument failed. *Id.* As in *Yee*, Mr. Koontz's unconstitutional conditions argument "fails at its base."

Applying *Nollan* and *Dolan* outside the context of *per se* takings would force judges to use a test designed to adjudicate whether it is permissible to take property as a condition of granting a permit, to *decide if there has been a taking in the first place.* This would be particularly problematic because the *Nollan-Dolan* tests were derived, at least in part, from the Due Process Clause and the language of *Agins*, 447 U.S. at 260,

which asserted that land use regulations must "substantially advance legitimate state interests." *See Nollan*, 483 U.S. at 834. This Court has subsequently ruled, unanimously, in *Lingle* that *Agins*'s "substantially advance" language is not an appropriate test for takings liability. In fact, recognizing that the *Nollan-Dolan* tests were rooted in *Agins*, the *Lingle* Court specifically addressed the continued validity of these tests and explicitly limited their application to permit conditions that involved *per se* takings. 544 U.S. at 545-49. By seeking to extend *Nollan* and *Dolan* to conditions suggested in the context of a failed negotiation that are not, in any event, *per se* takings, Petitioner invites this Court to obliterate this dividing line and blur again the clear line that the *Lingle* Court drew between the Takings Clause and the Due Process Clause. The Court should reject this invitation.

C. None Of The Conditions Suggested By The District Constitutes A *Per Se* Taking, And Thus *Nollan* And *Dolan* Cannot Be Applied To This Case.

As the previous section makes clear, to invoke the tests from *Nollan* and *Dolan*, Mr. Koontz must first show that the District demanded a condition that amounts to a *per se* taking in exchange for permit approval. This is impossible for Mr. Koontz to establish for two reasons. First, as explained in Section I.A, *supra*, the negotiations with Mr. Koontz never progressed to a point where any concrete demands were made by the District. Second, none of the conditions suggested by the

District during its negotiations with Mr. Koontz – let alone the single type of condition actually challenged by Mr. Koontz in this case, a condition requiring him to "dedicate money, services, labor, or any other type of personal property to a public use," Pet. Br. ii – remotely constitutes a *per se* taking. While it is Mr. Koontz's burden to demonstrate a *per se* taking, and he has not come close to meeting that burden, it is worthwhile to consider each of the conditions suggested by the District, in turn, simply to illustrate how unmanageable it would be for judges to apply *Nollan* and *Dolan* to offers made in the context of failed negotiations.

As this Court explained in *Lingle*, there are "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes": 1) when "government requires an owner to suffer a permanent physical invasion of her property," as in *Loretto*; and 2) when a regulation "completely deprive[s] an owner of '*all* economically beneficial us[e]'" of her property, as in *Lucas*. 544 U.S. at 538 (citations omitted). Outside of these "two relatively narrow [*per se*] categories" courts apply the deferential, multifactor test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Lingle*, 544 U.S. at 538. In this case, none of the proposed conditions would have been a *per se* taking if unilaterally imposed and, therefore, none could serve as the basis of an unconstitutional conditions allegation that warrants scrutiny under *Nollan* and *Dolan*.

Conservation Easement. In this case, Mr. Koontz has not seriously challenged the proposed condition calling for him to place his remaining wetlands in a conservation easement, presumably because he offered this to the District as mitigation for his proposed destruction of 3.4 acres of wetlands. *See KMST, LLC v. Cnty. of ADA*, 67 P.3d 56, 61 n.1 (Idaho 2003) (holding that there was "no taking because [the developer] itself proposed that it would construct and dedicate the street as part of its development"). Instead, he has focused on conditions that would require him to "dedicate money, services, labor, or any other type of personal property to a public use." Pet. Br. ii. Nevertheless, Mr. Koontz inaccurately describes this easement as a "giveaway" of his property and complains to this Court that he should not be forced to give up his "property and his money," apparently seeking to have this proposed conservation easement considered as part of any application of *Nollan* and *Dolan* to the denial of his requested permit.

What is clear, however, is that the proposed conservation easement would not have required Mr. Koontz to "give away" his property at all and thus does not constitute a *per se* taking. Rather, even if Mr. Koontz put a conservation easement on his remaining land, he would still maintain ownership and control over it and such an arrangement would not affect his right to exclude others, except for possible periodic visits by District staff to ensure compliance. As a result, rather than resembling the dedications of real property at issue in *Nollan* and *Dolan*, a conservation easement is

much more akin to the routine requirements of zoning law – lot size requirements, height limits, setbacks, buffer zones, etc. – that allow a landowner to build on only one portion of her property. Similar zoning laws have been upheld for over a century. *See, e.g.*, *Welch v. Swasey*, 214 U.S. 91, 107 (1909) (upholding the constitutionality of building height limitations); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (upholding the constitutionality of building setback regulations); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (upholding the constitutionality of a comprehensive zoning ordinance, which included height limits and open space requirements). While a landowner might be able to successfully bring a takings challenge to a particularly draconian zoning restriction along these lines, such restrictions certainly do not constitute *per se* takings.

On-Site Improvements. Although the option has received little attention since Mr. Koontz's permit hearing in 1994, the District also offered a proposed condition that would have permitted Mr. Koontz to further reduce environmental harms on-site by constructing a subsurface storm-water management system and replacing side-slope areas of his site with stem walls. Although Mr. Koontz's representative at the hearing argued that this option was "too costly" – without offering a shred of evidence to substantiate that conclusion – Mr. Koontz has not seriously challenged this suggested alternative in this case. Nevertheless, even if such on-site improvements were unilaterally imposed upon Mr. Koontz, such a condition would not amount to a *per se* taking and, therefore, once

again, *Nollan* and *Dolan* would not apply. Instead, such a condition would be evaluated in a manner similar to any other land use or building code requirement that might compel a landowner to alter her property to serve some public purpose – for instance, a regulation that might require a landowner to perform specific on-site improvements to make her house or business wheelchair accessible. Such a condition could be the basis of a takings claim under *Penn Central* or even of a rational basis challenge under the Fourteenth Amendment – claims that would almost certainly fail – but it is not a *per se* taking.

Off-Site Improvements. The main focus of this litigation throughout has been on the District's request for Mr. Koontz to perform some type of off-site mitigation – an option the District turned to after Mr. Koontz had rejected its suggestions about decreasing the size of his project or performing on-site remediation. Mr. Koontz has attempted to frame this proposal as a straightforward "demand" for a specific monetary exaction – a requirement for him to "dedicate his money to unrelated public improvements on the District's land." Pet. Br. 5. However, this is a gross mischaracterization of the facts underlying this case.

First, as mentioned in Section I.A, *supra*, the District did not require Mr. Koontz to perform off-site mitigation at all – let alone on "the District's land." Indeed, the District provided Mr. Koontz with on-site mitigation options as well, and was open to other, as-yet-unspecified, mitigation proposals offered by Mr. Koontz himself. The only

requirement was that any such proposals call for "equivalent mitigation enhancement options . . . within the Basin." R. 619. Second, Mr. Koontz's description of the proposed condition as a demand to "dedicate his money" – in other words, a straightforward monetary fee – is also inaccurate. Instead, as jointly stipulated by the parties before trial, the District suggested that Mr. Koontz could mitigate some of the harms caused by his proposed project by agreeing to "provide off-site mitigation by restoring and enhancing at least (50) acres of wetlands." Pet. App. E-2. At no time did the District request a "dedicat[ion] of money for those services." Instead, Mr. Koontz could satisfy the District's proposal however he saw fit – or offer an additional suggestion of his own.

Finally, even taking the proposed condition as Mr. Koontz has presented it – as a requirement to pay for off-site improvements that serve the public interest – such a condition would not amount to a *per se* taking if unilaterally imposed and, therefore, once again, *Nollan* and *Dolan* would not apply. Instead, such a requirement would be akin to a fee charged to a homeowner to repair culverts elsewhere in her community – perhaps to promote community-wide flood prevention. Such a fee – in other words, a general monetary obligation – could be challenged as an abuse of the police power under the Fourteenth Amendment, but it is not a *per se* taking. *See Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993) (rejecting the argument that a monetary obligation is a *per se* taking); *Sperry v. United States*, 493 U.S. 52, 62 n.9 (1989) ("Unlike real or

personal property, money is fungible . . . . If the deduction. . . . were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance."); *cf. E. Enters. v. Apfel*, 524 U.S. 498, 543 (Kennedy, J., concurring in the judgment and dissenting in part) ("The [general] liability imposed on [a coal company] [for healthcare benefits] no doubt will reduce its net worth and its total value, but this can be said of any law which has an adverse economic effect."). In the end, while it may be possible for *Nollan* and *Dolan* to apply to conditions calling for the relinquishment of a specific, identifiable fund of money, such as a checking account or the interest income generated in a government-created account, *see, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this case does not raise such an issue – nor does it, as suggested by Mr. Koontz, cleanly present the question of whether *Nollan* and *Dolan* apply to monetary fees.

II. MR. KOONTZ COULD HAVE CHALLENGED THE DENIAL OF HIS PERMIT APPLICATION UNDER *LUCAS*, *PENN CENTRAL*, OR THE FOURTEENTH AMENDMENT, BUT THOSE ARGUMENTS WOULD HAVE FAILED ON THE MERITS.

While the specialized tests of *Nollan* and *Dolan* cannot be applied to the permit denial at issue in this case, such a result does not, as Mr. Koontz alleges, "give the District unbridled power" to "abuse" permit applicants. Pet. Br. 25. Instead,

Mr. Koontz – and other similarly situated landowners – have several other potential claims available under both the Takings Clause and the Fourteenth Amendment. For instance, Mr. Koontz could have argued that the District's denial of his permit worked a taking under either *Lucas* or *Penn Central*. In addition, he could have argued that the negotiation process itself was so irrational as to violate the Fourteenth Amendment. *Vill. of Willowbrook v Olech*, 528 U.S. 562, 564 (2000). However, Mr. Koontz waived his *Lucas* claim explicitly before trial. In addition, he has not argued before this Court that his permit denial violated *Penn Central*'s three-part test. Finally, although Mr. Koontz raised certain Fourteenth Amendment concerns in the lower courts, they were summarily dismissed, and he has not offered any such arguments here.

Regardless, all three of these arguments – under *Lucas*, *Penn Central*, and the Fourteenth Amendment – fail on the merits in this case. This Part considers each argument, in turn.

However, before turning to these federal constitutional claims, it is also worth noting that Florida, like most states, provides permit applicants with a speedy remedy – mandamus – when a public agency is imposing unlawful conditions on the issuance of a development permit.[10] *See, e.g.*, *Cook v. Di Domenico*, 135 So. 2d

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[10] In addition, Mr. Koontz could have sought administrative review of his permit denial, a path he also chose not to pursue in this case. *See* Fla. Stat. § 120.68(1), (6), (7)(e); Pet. App. A-

245, 246 (Fla. Dist. Ct. App. 1961) (affirming the trial court's issuance of a pre-emptory writ of mandamus for issuance of a permit to construct a gasoline service station without the owner being compelled to waive his right to compensation for such improvements in event of a later taking for highway purposes). Had it been Mr. Koontz's objective efficiently to obtain the dredging permit he requested without being subjected to unlawful mitigation conditions, he had a clear path under *Cook* to test the legality of those conditions, and, if successful, obtain his dredging permit. Instead, Mr. Koontz bypassed that avenue and accused the District of taking his property without just compensation in violation of the Florida Constitution. By choosing a takings claim, Mr. Koontz began an odyssey of litigation that today – more than eighteen years after he first filed suit – has produced published appellate decisions known as *Koontz I* through *Koontz V*. This Court's decision – *Koontz VI* – risks a great, and wholly unnecessary, expansion of federal involvement in ordinary local land use permitting activities.

22; *Key Haven Associated Enters., Inc. v. Bd. of Trs. of the Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982). This administrative review process would have permitted Mr. Koontz to challenge the validity of his permit denial, whether based on an error in administrative decision-making or "on asserted constitutional infirmities in the administrative action." *Key Haven*, 427 So. 2d at 159.

A. Although Mr. Koontz Could Have Brought A Takings Claim Under Either *Lucas* Or *Penn Central*, He Waived His *Lucas* Claim Explicitly Before Trial, And His *Penn Central* Claim Would Have Failed On The Merits.

Beginning with *Lucas v. S.C. Coastal Council*, Mr. Koontz could have argued that the District's decision worked a taking by denying him "all economically beneficial use[]" of his property. 505 U.S. 1003, 1019 (1992). However, he explicitly waived such a claim before trial and has offered no such argument before this Court. *See* R. 619 ("Plaintiff is not proceeding upon a theory that the two District final orders deprived Koontz of all or substantially all economically beneficial or productive use of the subject property.").

Turning to *Penn Central*, Mr. Koontz could have argued that the District's permit denial was so economically burdensome as to resemble a confiscation, based on that denial's overall "economic impact" on Mr. Koontz, its "character," and "the extent to which [it] interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. However, Mr. Koontz has made no such argument here. Furthermore, even if he had, such a claim would have failed on the merits.

The "aim[]" of the *Penn Central* test is to determine whether a challenged regulation is the "functional[] equivalent" of a "classic taking," where

"government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. This inquiry focuses on "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 540. Where a court determines that a given regulation is a legitimate exercise of the police power, it will be upheld even if it "destroy[s] . . . recognized real property interests" and "cause[s] substantial individual harm." *Penn Central*, 438 U.S. at 125. In the end, under *Penn Central*, Mr. Koontz would have had the burden of proving a constitutional violation – a high burden that he could not have met in this case. *See id.* at 130-31, 136, 138 n.36.

The District's decision to deny Mr. Koontz's permit was a legitimate exercise of the police power – an attempt to comply with state law and offset the environmental harms associated with Mr. Koontz's proposed development. Resp't Br. 4-7; 9-10. Indeed, the District could have denied Mr. Koontz's permit application outright, based on its legitimate interest in stemming the loss of wetlands in Florida. Furthermore, following the denial of his permit, Mr. Koontz was simply in the same position he was in before his negotiations with the District began; he owned an undeveloped tract of land that still had some economic value. In fact, during the course of the parties' negotiations, the District even offered Mr. Koontz an opportunity to develop one acre of his property without performing any on-site improvements or conducting any off-site mitigation – a proposal that Mr. Koontz rejected out of hand. Based on these facts alone,

Mr. Koontz's *Penn Central* claim would have failed. Finally, the challenged conditions themselves – the District's so-called "demands" for off-site mitigation – do not alter this analysis. At trial, Mr. Koontz's own expert described the costs associated with these proposals as "minimal" and actually recommended that Mr. Koontz accept the District's offer to perform off-site mitigation – an offer that he described as "excellent." Trial Tr. 60, 62.

In the end, given the limited economic burdens associated with the District's denial of Mr. Koontz's permit, the character of the District's actions, and the legitimacy of the District's underlying interests, Mr. Koontz's *Penn Central* claim would have failed on the merits.

B. Even If Mr. Koontz Had Presented An Argument Under The Fourteenth Amendment To This Court, It Would Have Failed On The Merits As Well.

Without credible claims under *Lucas* or *Penn Central*, Mr. Koontz initially relied, in substantial part, on the heightened scrutiny provided by *Agins*, arguing that the District's denial of his permit failed to "substantially advance a legitimate government interest." 447 U.S. at 260. However, during the course of Mr. Koontz's litigation, this Court unanimously overruled the *Agins* test, emphasizing the "serious practical difficulties" of applying "heightened means-ends review" to the "regulation of private property." *Lingle*, 544 U.S. at 544. In effect, *Agins* had imported due process principles into takings law – an anomaly

recognized by this Court and corrected in its unanimous decision in *Lingle*. In rejecting the *Agins* test, this Court focused, in particular, on the judiciary's limited competence in this area, noting that heightened scrutiny under *Agins* "would require courts to scrutinize the efficacy of a vast of array of state and federal regulations – a task for which courts are not well suited." *Id.* Indeed, the *Lingle* Court feared that it "would empower – and might often require – courts to substitute their predictive judgments for those of elected legislatures and expert agencies." *Id.*

After *Lingle*, the Fourteenth Amendment still provides landowners like Mr. Koontz with a federal floor of protection against "irrational" actions taken by government agencies.[11] *See Lingle*, 544 U.S. at

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[11] Beyond the Fourteenth Amendment, there are additional safeguards for landowners facing onerous permit conditions that have actually been approved by the government – safeguards under state-law doctrines derived from due process principles, such as the reasonable relationship test. *See, e.g., Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965) (applying Wisconsin's reasonable relationship test); *see generally* Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 Hastings L.J. 729, 731-33, 758-64 (2007) (outlining the various state-law protections that apply to negotiations between property owners and land-use agencies); Jerold Kayden & Robert Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, Law & Contemp. Probs. 127 (1987) (describing how the reasonable relationship test applies to mitigation fees). These tests – which predate *Nollan* and *Dolan* and, today, stand in conjunction with them – further ensure that any conditions imposed by land use agencies are reasonably related to legitimate regulatory

542 ("[A] regulation that fails to serve any legitimate government objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."); *Olech*, 528 U.S. at 563 (concluding that an allegation that a village's demand was "irrational and wholly arbitrary" stated a claim under the Equal Protection Clause). However, Mr. Koontz has not offered any such arguments here. Furthermore, even if he had, they would surely have failed on the merits.

First, District staff members considered Mr. Koontz's application and, based on their analysis, made recommendations to the District on how best to mitigate the environmental harms associated with Mr. Koontz's proposal. These recommendations took the form of a series of mitigation options suggested to Mr. Koontz, each designed to comply with well-established state guidelines. Therefore, the District's behavior in these initial negotiations was not "irrational." *Olech*, 528 U.S. at 563.

Second, following the analysis offered by District staff, the District held a permit hearing, which allowed Mr. Koontz's chosen representative to contest the District's findings and offer Mr. Koontz's reasons for why he should receive a development permit free of any further conditions.

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interests. Such conditions, however, do not apply to landowners like Mr. Koontz, who face conditions that have been merely proposed during the course of failed land use negotiations.

Only after this hearing – and after Mr. Koontz rejected the District's offer to continue negotiating – did the District make its final decision on his permit application. These actions easily satisfy the Fourteenth Amendment. In the end, the District, like most land use agencies, was simply trying to negotiate a set of conditions that would permit development to go forward, while also providing mitigating benefits to account for the very real costs that development can impose upon the community at large – a negotiation process that Mr. Koontz short-circuited by filing this lawsuit.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the Florida Supreme Court.

Respectfully submitted,

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December 28, 2012

AMICUS CURIAE BRIEF

No. 11-1447

In The Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF OF AMICI CURIAE ASSOCIATION OF FLORIDA COMMUNITY DEVELOPERS, THE FLORIDA LAND COUNCIL, THE FLORIDA FARM BUREAU, AND THE FLORIDA FRUIT AND VEGETABLE ASSOCIATION IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICI CURIAE[1]

Regulatory agencies in Florida and elsewhere are charged with avoiding, minimizing, or mitigating adverse land use impacts when approving developments. Their final land use approvals are the culmination of a give-and-take process of negotiations. At issue here is whether this Court's decisions in *Nollan v. California Coastal Comm'n*, 438 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) should continue to serve as silent referees in these negotiations, as guarantors of their integrity.[2] Integrity is the difference between negotiation and extortion, between a fair deal and a shake-down. *E.g., Nat'l Labor Relations Bd. v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 93 (1957).[3] For purposes of the land development process, it is the constitutional line that keeps negotiations from straying too far – in both substance and form – from the goal of avoiding,

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[1] Letters consenting to the filing of this and other amici curiae briefs have been filed with the Clerk of Court by both the Petitioner and Respondent. Counsel for Amici also verbally informed counsel for the parties of the Amici's intent to file this brief, and received their oral consent. No counsel for a party authored this brief in whole or in part, and no person, other than Amici or their counsel, made any monetary contribution to the preparation or submission of this brief.

[2] This brief refers to *Nollan* and *Dolan* collectively as the *Nollan/Dolan* doctrine.

[3] There, in a labor dispute, this Court's decision was motivated, in part, by a desire to ensure "the preservation of the integrity of [negotiations by] the multi-employer bargaining unit."

minimizing, and mitigating adverse land use impacts. The Association of Florida Community Developers, the Florida Land Council, the Florida Farm Bureau, and the Florida Fruit and Vegetable Association submit this brief as Amici Curiae in support of the Petitioner, Mr. Koontz, to preserve that integrity.

Amici are non-profit associations whose members have substantial real property holdings throughout Florida. Together, Amici and their members represent a significant segment of Florida's regulated community. Just as Mr. Koontz, Amici and their members must obtain approval from local, state, and federal agencies for intensified land use. Amici thus have substantial experience navigating Florida's regulatory maze.

Although Amici may differ in purpose and composition, they speak with one voice to the profound importance of ensuring the integrity of the negotiation process at the heart of land use regulation. *See Gen. Dev. Corp. v. Div. of State Planning, Dep't of Admin.*, 353 So. 2d 1199, 1206 (Fla. 1st DCA 1978) (referring to "the centrality of negotiation" under Florida's modern system of land use regulation). This Court's decisions in *Nollan* and *Dolan* were motivated by a desire to preserve that integrity, to ensure that negotiations do not devolve into extortion. A clear and unequivocal articulation of the *Nollan/Dolan* doctrine's scope would forever clarify these protections. Allowing the Florida Supreme Court's decision in *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220 (Fla. 2011) to stand would unravel them.

While courts around the country are currently split on scope of the *Nollan/Dolan* doctrine, *see* Pet. for Cert. at 16-18, here the Florida Supreme Court limited the *Nollan/Dolan* doctrine to a very narrow category of exactions. *Koontz,* 77 So. 3d at 1330-31. The Florida Supreme Court feared that applying the *Nollan/Dolan* doctrine as Mr. Koontz asked would make land use regulation in Florida "prohibitively expensive" because agencies would "opt to simply deny permits outright without discussion or negotiation," and "[l]and development in certain areas of Florida would come to a standstill" as a result. *Id.* at 1031. Not so.

In Florida, "the centrality of negotiation" is sacrosanct. *Gen. Dev. Corp.,* 353 So. 2d at 1206. Agencies and applicants will always negotiate within the broader regulatory framework. At issue are the contours of those negotiations, the constitutional line that balances an agency's responsibilities with the applicant's rights. To be sure, administrative convenience should never trump a constitutional right.

By drawing the line as it did, the Florida Supreme Court invited state-sanctioned mischief. Amici now remain at the mercy of savvy but cash-strapped agencies and local governments that may well escape the *Nollan/Dolan* doctrine by simply recasting land dedications as impact fees or by changing the timing of an exaction, forcing applicants to submit to an exaction before challenging its constitutionality. Amici find neither option acceptable. Amici accordingly have a real and

substantial interest in this Court overturning the Florida Supreme Court's limits on the *Nollan/Dolan* doctrine, in preserving the integrity of Florida's land development process.

SUMMARY OF THE ARGUMENT

Meaningful negotiations – those focused on conditions directly related and proportionate to impacts from a proposed land use – lead to sound public policy. Extortion does not. Yet for Floridians like Amici and their members, the Florida Supreme Court's decision reduces land use decisions to just that. It transforms an already tilted process into one where state-sanctioned abuse may go unchecked. *Nollan* and *Dolan* require more.

Under the *Nollan/Dolan* doctrine, state agencies and local governments must justify whether an exaction bears an "essential nexus" and a "rough proportionality" to the impact the exaction intends to address. These requirements should apply with equal force to all exactions, regardless of form or timing.

Limiting the *Nollan/Dolan* doctrine would spell its demise. Regulatory agencies could easily avoid the doctrine by transforming land dedications into monetary exactions. And many applicants would find it unworkable to proceed with a project that is economically infeasible in order to challenge the very condition that made it so.

By contrast, the clear and unequivocal application of the *Nollan/Dolan* doctrine to this case

would do much good. It would curb the abuses that currently occur, making land use negotiations more focused. This, in turn, would reduce the need for after-the-fact litigation. The cost of land use regulation – from both the agency and applicant perspective – would decline.

The Court must thus make a simple but stark choice: affirm the Florida Supreme Court's decision and recede from the *Nollan/Dolan* doctrine or reverse the Florida Supreme Court's decision, preserve the integrity of land use negotiations, and prevent leveraging of the police power. Amici respectfully urge the Court to reverse the Florida Supreme Court's decision in all respects.

ARGUMENT

I. THE COURT SHOULD REAFFIRM THAT *NOLLAN* AND *DOLAN* REQUIRE A STATE AGENCY TO JUSTIFY THE EXACTIONS IT IMPOSES ON THE DEVELOPMENT OF PROPERTY REGARDLESS OF THE TYPE OF EXACTION OR ITS TIMING.

Negotiation is central to Florida's system of land use regulation. *Gen. Dev. Corp.*, 353 So. 2d at 1206. But this negotiation takes place at a bargaining table tilted distinctly in favor of the government. The situation is ripe for the type of "leveraging of the police power" feared by the *Nollan/Dolan* doctrine. *Nollan,* 438 U.S. at 837, n. 5. Abuses routinely occur. A clear application of the *Nollan/Dolan* doctrine to all exactions, regardless of timing, would provide a constitutional shield against

regulatory abuse, making negotiations more meaningful – more focused on conditions directly related and proportionate to impacts from a proposed land use.

A. The bargaining table is titled distinctly in favor of the government, creating a situation ripe for abuse.

Clothed in state-sanctioned expertise, state agencies are formidable creatures. An agency in Florida – just like a federal agency – is entitled to substantial deference at every step of the regulatory process. Its interpretation of statutes is entitled to deference, *BellSouth Telecommunications, Inc. v. Johnson,* 708 So. 2d 594, 596 (Fla. 1998), its decision to promulgate or implement a rule is entitled to deference, *Roy v. Florida Dep't of Corr.,* 600 So. 2d 544, 545 (Fla. 1st DCA 1992), and its decision to add gloss through administrative guidance is usually immune from challenge, *Envtl. Trust v. Dep't of Envtl. Prot.,* 714 So. 2d 493, 498 (Fla. 1st DCA 1998). At every step, the applicant bears the burden of refuting an agency's position.

The same is true in most takings contexts. Takings law in Florida is identical to federal law. *See, e.g., Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.,* 640 So. 2d 54, 58 (Fla. 1994). So, in Florida, there exist two narrow categories of *per se* takings: one occurs when government action causes a permanent physical invasion of property, *see Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), the other when government action completely deprives a

property owner of all economically beneficial use of the property, *see Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). A regulatory taking occurs under the *Penn Central* test depending on the economic impact of a regulation, the extent to which the regulation interferes with investment-backed expectations, and the character of the governmental action. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978).

In practice, a state agency may easily avoid *per se* takings by refraining from physically taking property and leaving some residual value for the property owner. And the *ad hoc Penn Central* test rarely deters an agency since it is the functional equivalent of the rational basis test in an equal protection context. Put another way, it is a Hail Mary pass thrown in desperation with little chance of success. *Cf.* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity,* 92 Cal. L. Rev. 609, 611 (2004) ("the majority of regulatory acts enjoy deferential treatment in an *ad hoc* balancing test").

So, in any negotiation, a state agency enjoys substantial administrative and constitutional advantages. Taken together, these advantages allow an agency to leverage its superior bargaining position into concessions that it could not otherwise justify. *See* Thomas C. Schelling, Strategy of Conflict 21-80 (Paperback ed., Harvard University Press 1980) (1960) (using game theory to discuss bargaining in general). The situation is ripe for abuse, and Florida is rife with examples.

Amici highlight abuses in one specific context: the Community Planning Act ("Planning Act"), Chapter 163, Part II, Florida Statutes. The Planning Act, like the myriad of other state and federal requirements that apply to land development, is designed to help an applicant avoid, minimize, or mitigate the effects of development. Among other things, the Planning Act requires local governments to undertake a process of "comprehensive planning" to "preserve, promote, protect, and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire prevention, and general welfare." Fla. Stat. § 163.3161(4) (2012). Indeed, each local government must adopt and maintain a comprehensive plan, *id.* § 163.3167(2), and, with limited exceptions not pertinent here, "no public or private development shall be permitted except in conformity with the comprehensive plan[]," *id.* § 163.3161(6). Local governments often amend comprehensive plans, sometimes at an applicant's request. *E.g., id.* § 163.3162(4).

Comprehensive plan approval or amendment often comes with conditions. To obtain approval for an intensified land use like mining, for example, an applicant must comply with several conditions. Most require applicants to protect sensitive areas, and otherwise ensure the safety of adjacent properties and property owners. Such conditions are usually related and proportionate to the harm both the agency and applicant wish to avoid, minimize, or mitigate.

Some conditions for mining approval, however, require the applicant to provide millions of dollars for local parks, construction of fire stations, and college tuition for local residents. While conditioning approval on money for parks, fire stations, and tuition is commendable, it has little relationship – let alone an essential nexus – to mining. Many applicants nevertheless bear these substantial costs as the price for getting a project approved and underway. *See, e.g.,* Agreements Accompanying Hardee County Resolutions 12-21, 08-19 and Manatee County Ordinance 08-32.[4]

The same is often true for transportation concurrency. Commercial and residential development may burden a community's existing transportation network. Conditions to minimize or mitigate the burdens seem natural. Many comprehensive plans thus include a transportation concurrency requirement. The goal of this requirement is to ensure that transportation facilities and services become available concurrently with the impacts of the development. Local governments define what constitutes an adequate level of service for the transportation network, and then measure whether a proposed development would exceed the existing capacity. If adequate capacity is unavailable or the proposed development would exceed capacity, then the applicant must provide for the necessary improvements to the system, contribute money towards the improvement,

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[4] These materials are available through www.hardeecounty.net and www.manateeclerk.com respectively.

or wait until the government provides the necessary improvements.

Applicants throughout Florida have paid many millions of dollars in road improvements based on a project's expected contribution to the need for added capacity – as measured by a government approved methodology. Many have even paid more than their fair share. Some, when left with no choice other than abandoning a project, have sued.

In 2007, for instance, an applicant hoping to develop 550 acres of property near the interstate in the vibrant college town of Gainesville, Florida, sued the county over transportation concurrency issues. *See PR Gainesville, LP v. Alachua County,* Complaint Case No. 01-07-CA257 (Fla. 8th Jud. Circuit 2007-10). Using a methodology agreed upon by the county and other state agencies in a pre-application agreement, the applicant proposed that of the $40 million in needed transportation improvements, it was responsible for up to $21.5 million. *Id.* at ¶¶ 25-49. The applicant even offered to finance all $40 million in improvements, with the county repaying its share. *Id.* The county demurred and opted instead to conduct a separate analysis, which departed in material respects from the agreed upon methodology. *Id.* at ¶¶ 151-66. Using this new analysis, the county concluded that the developer was in fact responsible for $58 million out of $120 million in needed road improvements. *Id.* at ¶¶ 161-62. This exaction, however, made the applicant's project financially unviable. *Id.* at ¶¶ 354-57.[5]

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[5] After almost three years of litigation in the midst of the Great Recession, the parties voluntarily dismissed the case.

The county's efforts to exact as much money as possible from the applicant should be expected. Florida's transportation system has been chronically underfunded. *Joint Report on the Mobility Fee Methodology Study,* Dec. 1, 2009 at 13-16 (noting that in 2006 the Florida Department of Transportation identified $53.2 billion in unfunded needs).[6] Transportation concurrency requirements therefore serve as a "regulatory standard on an already overburdened and deficit-ridden service system without a strategy to cure past neglect and accommodate new needs." Robert M. Rhodes, *Concurrency: Problems, Practicalities, and Prospects,* 6 J. Land Use & Envtl. L. 241, 244 (1991). Since there is no concrete plan to reform the regulatory system generally or the transportation system specifically, local governments have every incentive to shift the burden of transportation improvement to applicants. The applicants, in turn, face a Hobson's Choice: either "pay exorbitant up-front service costs far exceeding their fair share, or walk away from the project." *Id.* at 244. Many pay.

B. The *Nollan/Dolan* doctrine provides meaningful protections; the Florida Supreme Court unravels these protections.

The *Nollan/Dolan* doctrine was meant to offer protection from such abuses, "to protect against the State's cloaking within the permit process an out

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[6] The report is available at http://www.dot.state.fl.us/intermodal/mobility/MobilityFee.pdf

and out plan of extortion." *Lambert v. City & County of San Francisco,* 529 U.S. 1045, 1051 (2000) (Scalia, J., dissenting from denial of cert.). It did so by requiring the government – not the applicant – to show that a condition had an "essential nexus," *Nollan,* 483 U.S. at 835, and a "rough proportionality," *Dolan,* 512 U.S. at 391, to the impact the condition intends to address.

To be sure, the *Nollan/Dolan* doctrine's scope was vague. The Court's decisions left open three questions. Fenster *supra* at 635-40. First, the Court did not specifically address whether *Nollan* and *Dolan* apply to conditions other than land dedications, to the dedication of money, services, labor or other types of personal property. *Id.* at 635-36. Second, the Court did not resolve whether the *Nollan/Dolan* doctrine applies only to exactions imposed through decisions regarding a particular piece of property or also to decisions directed at property within the jurisdiction generally. *Id.* at 637-39. Third, the Court left open the possibility of an applicant seeking protection from *Nollan* and *Dolan* even if it refuses to submit to the proposed exaction or the state withdraws it. *Id.* at 639-40. Courts throughout the country have failed to provide consistent answers to these questions. *Id.* at 635-40; Pet. for Cert. at 16-18. And until *Koontz*, no Florida appellate court squarely addressed these questions.

Still, the Court's lack of clarity offered some protection. Applicants in Florida could use *Nollan* and *Dolan* to curb abuses at the margins. As the Nobel Laureate Thomas Schelling might put it, applicants could use the *Nollan/Dolan* doctrine to

credibly threaten state agencies with its use and, from the agency's perspective, possible extension. *See* Schelling *supra* at 119-61; Daniel B. Klein & Brendan O'Flaherty, *A game-theoretic rendering of promises and threats,* 21 Journal of Economic Behavior & Organization 295-314 (1993).

The Florida Supreme Court's decision now undoes even the virtues of ambiguity, making *Nollan* and *Dolan* altogether superfluous in the process. In clear and unambiguous terms the Florida Supreme Court held that the *Nollan/Dolan* protections apply only to conditions that ask an applicant to dedicate land and only if the applicant accepts them. *Koontz,* 77 So. 3d at 1230. This decision will allow Florida's agencies to routinely sidestep *Nollan* and *Dolan.*

Consider, for example, the facts in *Nollan.* There, the California Coastal Commission approved the Nollans' request for a building permit to expand their home. *Nollan,* 483 U.S. at 828. It did so subject to the dedication of an easement that would allow the public to pass across the beach owned by the Nollans behind their home. *Id.* The Nollans sued. *Id.* at 828-30. This Court held that the easement – the exaction – constituted an uncompensated taking because the public's ability to traverse up and down the rear of the family's property did not bear an "essential nexus" to the public's right to view the shore from the front of the home. *Id.* at 835-42.

In Florida, similar facts would now yield the opposite result. A state agency could avoid the essential nexus requirement by slightly tweaking its

condition. For example, instead of asking for the dedication of an easement on the family's property, a state agency could simply require the family to pay money into an easement acquisition fund or ask the family to provide money, services or labor to improve existing beach easements. The agency could even ask the family to fund local parks, a fire station, or college tuition for the community. While such exactions would continue to bear no essential nexus to the property or the obstruction of shore view as a result of the property's improvement, they would fall outside the protections offered by *Nollan* and *Dolan*. The exactions would thus stand. *See Koontz,* 77 So. 3d at 1230. *Nollan* and *Dolan* would not. *Id.*

It is equally impractical to require that an applicant accept an unconstitutional condition before challenging it. As the intermediate appellate court recognized in this case, an applicant must have the choice to take a permit denial and challenge the constitutional validity of the proposed condition where it "materially alters the design, density, or economic feasibility of the project." *St. Johns River Water Mgmt. Dist. v. Koontz,* 5 So. 3d 8, 12 n.4 (Fla. 5th DCA 2009). The practicalities of business planning demonstrate the soundness of the intermediate court's reasoning.

In Florida, as elsewhere, a project requires planning and financial analysis to align regulatory requirements and business goals. An applicant must, for example, understand and weigh the costs of natural resource protection, mitigation of transportation impacts, and provisions for affordable housing, among other requirements, to determine

whether a project justifies the investment of capital. A project will "pencil out" if the return on investment justifies the costs – if the project is expected to be profitable. *E.g.,* Benjamin Powell & Edward Stringham, *"The Economics of Inclusionary Zoning Reclaimed": How Effective are Price Controls?,* 33 Fla. St. U. L. Rev. 471, 484 (2005) (discussing "pencil out" concept in the context of price controls).

If a project cannot "pencil out" because of a disputed exaction, then forcing the applicant to accept a permit as a condition precedent to challenging the disputed exaction would force the applicant to accept an approval for a project it would not build in order to challenge the condition which rendered it infeasible. Stated differently, if upheld, the Florida Supreme Court's decision would require an applicant to accept a condition – binding itself in the process – before challenging the condition's constitutional validity. This would surely discourage applicants from relying on the *Nollan/Dolan* doctrine when it matters most, when a condition stands between a feasible or infeasible project. Again, the logic of *Nollan* and *Dolan* would be fatally compromised. Leveraging of the police power would go unchecked. *Compare Lambert,* 529 U.S. at 1051 ("There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than a condition subsequent should make a difference [under the *Nollan/Dolan* doctrine]") *with Koontz,* 77 So. 3d at 1230 (holding that the *Nollan/Dolan* doctrine applies "only when the regulatory agency actually issues the permit sought").

C. A response to the Florida Supreme Court's unfounded concerns and why a clear application of the *Nollan/Dolan* doctrine makes for good policy.

The Florida Supreme Court nevertheless limited the *Nollan/Dolan* doctrine to a narrow category of exactions, justifying its decision as the way to keep agencies from denying permits without discussion or negotiation. *Koontz,* 77 So. 3d at 1330-31. The Florida Supreme Court cited no authority or social science literature to support this proposition – one that deviates from almost four decades of agency norm. *See, e.g., Gen. Dev. Corp.,* 353 So. 2d at 1206. In fact, Florida law suggests that agencies would continue to negotiate regardless of the outcome of this case.

In Florida, a final decision by a state agency – not the negotiations with staff leading up to it – serves as the basis of any takings claim. Section 373.617(2) of the Florida Statutes, for example, provides that "circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation." The negotiations simply color the process and, unless reduced to writing as specific agreements or stipulations, provide little evidentiary value. Thus, even if the *Nollan/Dolan* doctrine were to apply the exactions imposed on Mr. Koontz, an agency risks little by negotiating with an applicant.

An applicant, by contrast, gains much if the Court were to apply the *Nollan/Dolan* doctrine in

clear and unequivocal terms. If a state agency must demonstrate that its conditions are related and proportionate to the harm it seeks to prevent, the agency would have an incentive to temper its excesses. In turn, the applicant would avoid having to negotiate over unrelated extras, like fire stations, parks, and tuition. Stated differently, the negotiation would focus exclusively on the harm that both the agency and applicant seek to avoid, minimize, or mitigate. Negotiations would then be shorter, fairer, and more predictable. Less litigation would follow.

And, in many instances, because of the doctrine of administrative exhaustion, the litigation that might follow would first go through Florida's administrative process which "permits full development of a factual record and technical issues." *Galaxy Fireworks, Inc. v. City of Orlando*, 842 So. 2d 160, 163 (Fla. 5th DCA 2003). There, the agency would have an opportunity "to correct any errors and possibly moot the need for court action." *Id.* Adverse factual findings by an impartial administrative law judge would also deter applicants from clogging the courts with meritless claims predicated on the *Nollan/Dolan* doctrine.

CONCLUSION

Amici accordingly urge the Court to reverse the Florida Supreme Court's cramped reading of *Nollan* and *Dolan*. Holding otherwise would allow regulatory agencies to easily sidestep the doctrine, frustrating its goal of reining in leveraging of the

police power and blurring the constitutional line that separates negotiations from extortion.

Respectfully submitted.

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November 27, 2012

AMICUS CURIAE BRIEF

No. 11-1447

IN THE

Supreme Court of the United States

COY A. KOONTZ, JR.,
Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,
Respondent.

On Writ of Certiorari to Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION, CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND REASON FOUNDATION IN SUPPORT OF PETITIONER

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November 28, 2012

QUESTIONS PRESENTED

The questions presented* are:

Whether the government violates the Takings Clause when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan* and *Dolan*; and

Whether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.

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* The Questions Presented are as stated in Petitioner's Merits brief, the phrasing of the first of which was altered pursuant to Rule 24.1.

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INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm. It provides legal representation, without fee, to scientists, parents, educators, other individuals, small businesses and trade associations. The Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. The Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community.

Atlantic Legal Foundation has served as counsel for plaintiffs and *amici* in numerous "takings" cases, including: *Cole v. County of Santa Barbara*, 537 U.S. 973 (2002) (counsel for *amici* associations of small property owners in support of petition for certiorari in challenge to a state law procedural

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief; *amici* have complied with the conditions of such consent. Copies of those consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

bar to claims for unconstitutional takings based on "ripeness"; *Sackett v. Environmental Protection Agency*, ___ U.S. ___, 132 S. Ct. 1367 (2012) (counsel for National Association of Manufacturers as *amicus* in challenge to issuance by Environmental Protection Agency of an administrative compliance order under § 309 of the Clean Water Act; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (counsel for real property owners' associations as *amici* in challenge to development moratoria); and *Brody v. Village of Port Chester*, 345 F.3d 103 (2nd Cir. 2003) (co-counsel for plaintiff in challenge to taking of property for non-public use and inadequate notice of final decision to condemn under due process requirements of Fourteenth Amendment).

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute. Their mission is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that private property can be taken only upon payment of just compensation. The Center provides counsel for parties in state and federal courts and has participated as *amicus curiae* before this Court in several cases of constitutional significance, including: *Sackett v. Environmental Protection Agency*, ___ U.S. ___, 132 S. Ct. 1367 (2012); *Stop the Beach Renourishment v. Florida Department of Environmental Affairs*, 560 U.S. ___, 130 S.Ct. 2592 (2010); *Rapanos v. United States*, 547 U.S.

715 (2006); and *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005).

Reason Foundation ("Reason") is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies – including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, http://www.reason.com/and http://www.reason.tv/, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues, *e.g.*, *Kelo v. City of New London, Connecticut*.

STATEMENT OF THE CASE

Amici rely on Petitioner's Statement of the Case, but here highlight the salient facts.

Petitioner's father and predecessor in interest, Coy Koontz, Sr. ("Koontz.") applied for permits from Respondent St. Johns River Water Management District (the "District").[2] The District demanded that Koontz transfer title to 75% of his land to the State *and* to perform costly off-site improvements to government-owned property distant from the Koontz parcel as conditions precedent to the issuance of the permits. Pet. Cert. App. A-6. When Koontz rejected the District's conditions the District denied the permits. Pet. Cert. App. D-4; J.A. 70-71. Koontz then sued.

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[2] In 1994, Koontz submitted applications to the District for permits to develop 3.7 acres within a "Riparian Habitat Protection Zone" and offered to place 11 acres of his property in a conservation easement. (Pet. Cert. App. A-5-A-6; Pet. Cert. App. D-4). As required by the District's regulations, Koontz included in his permit applications mitigation for the presumed disturbance to riparian habitat. (Pet. Cert. App. A-6; Pet. Cert. App. D-4; J.A. 29-30, 107). Other development projects had degraded the proposed site from its original condition and rendered it inhospitable as an animal habitat (Pet. Cert. App. D-3; *see also* J.A. 101-02, 111-19, 137-39) (describing conditions in project area). When experts inspected the property, the only standing water on the project site was in ruts along an easement road owned by the State, and used and maintained by a power company. (J.A. 117-18, 142-43).

Immediately before the hearing on his applications, Koontz was told by the District's staff that they would recommend denial of the permit applications unless, in addition to the 11-acre dedication, he agreed to finance the restoration and enhancement of at least 50 acres of wetlands on District-owned property located miles away by replacing culverts or plugging ditches, and building a new road. J.A. 26, 103-04, 109.[3]

Koontz became concerned about the economic feasibility of the project if he complied with the District's demands, J.A. 29-30, 34-35, 100, 105, so he refused to acquiesce to the demand for off-site work. Pet. Cert. App. D-4. The Board denied his permit applications. J.A. 70-71. "[T]he denials were based exclusively on the fact that [Koontz] would not provide additional mitigation to offset impacts from the proposed project," *i.e.*, restoration and enhancement of the District's property. J.A.

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[3] The District asserted that because the property was located in its Riparian Habitat Protection Zone, *any* use was "presumed to be harmful." J.A. 33, but the District's staff admitted that they had disregarded several experts who had concluded that the project area was already degraded and that they had not done surveys of the project site to determine the presence of riparian habitat, and they had no evidence to refute Koontz's contrary studies. J.A. 146. The District never demonstrated how the Koontz project, confined to a small part of his property, could justify either the demand for transfer of a majority of the parcel or the requirement that Koontz pay for off-site public improvements.

70. If Mr. Koontz had acceded to this condition, "the exact project [he] proposed would have been permitted." J.A. 71. Without the permits, Koontz could not use his property. Pet. Cert. App. A-5-6.

In late 1994, Koontz filed an action against the District in Florida state court under state law. J.A. 4-65. The case was tried in 2002 on the question of "whether the off-site mitigation required by the District was an unreasonable exercise of police power" constituting a taking without just compensation, under section 373.617(b) of the Florida Statutes. Pet. Cert. App. B 19 n.3.

The trial court relied on two of this Court's takings precedents – *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) – to conclude that the District's exaction requiring off-site public improvements on government land was unconstitutional under the Takings Clause of the Fifth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment. Pet. Cert. App. D-5-6, 10-11; Pet. Cert. App. B-19 n.3; J.A. 95. The trial court found that the District "did not prove the necessary relationship between the condition of off-site mitigation and the effect of development." Pet. Cert. App. D-11. The court explained that the District failed to show either an "[essential] nexus between the required off-site mitigation and the requested development of the tract[]" as required in *Nollan*, or "rough proportionality to the impact of site development," as required in

Dolan. *Id.* Accordingly, the trial court concluded that the District's "denial of the Koontz permit application . . . was invalid" as "an unreasonable exercise of police power." *Id.* at 10-11.

The trial court entered judgment for Koontz, reserving jurisdiction to award monetary damages authorized by section 373.617(b) until the District responded to the judgment. Pet. Cert. App. D-11. The trial court ordered the District to issue the permits by June 2004, but the District delayed issuing the permits until December 2005, over 11 years after it denied the permit applications. Pet. Cert. App. A-7; J.A. 183. The District approved Koontz's permit applications without the unlawful exaction. Pet. Cert. App. A-7. As provided by Fla. Stat. §373.617(2), providing for "monetary damages and other relief" for "an"), the trial court subsequently awarded damages resulting from the District's unreasonable exercise of the state's police power denying the permit applications, which constituted a taking without just compensation. Pet. Cert. App. C-2.

On appeal, the District argued that Koontz had no cause of action under section 373.617(2) because *Nollan* and *Dolan* were inapplicable to the challenged exaction and those cases apply only to exactions made on the issuance of a permit, and not to exactions imposed prior to issuance. Pet. Cert. App. B-6. The District also argued that *Nollan* and *Dolan* apply only to exactions of

interests in real-property, not to monetary exactions. Pet. Cert. App. B-9.[4]

The Florida intermediate appellate court rejected the District's arguments, and held that *Nollan* and *Dolan* apply to all property exactions, including monetary ones, that are imposed prior to permit issuance. Pet. Cert. App. B-8-10. Because the District did not dispute that, if *Nollan* and *Dolan* applied, its permit exaction would fail the "essential nexus" and "rough proportionality" tests (Pet. Cert. App. B-6), the court affirmed the trial court's judgment against the District. Pet. Cert. App. B-10.

The Florida Supreme Court reversed, holding that *Nollan* and *Dolan* do not apply to monetary exactions, such as the one imposed by the District. Misconstruing *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), and *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), the court held that this Court intended *Nollan* and *Dolan* to be strictly limited to their facts. Pet. Cert. App. A-15-16. The court also held that *Nollan* and *Dolan* did not apply to the District's exaction, because the District "did not issue [the] permits"

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[4] It is significant that the District did not dispute the trial court's factual findings that there was no essential nexus or rough proportionality between the impact of Koontz's project and the District's conditions. Pet. Cert. App. B-6 ("The District makes no challenge to the evidentiary foundation for [the] trial court's factual findings.")

and "nothing was ever taken from Koontz." Pet. Cert. App. A-21 (original emphasis omitted).[5]

The Florida Supreme Court reversed the court of appeals. Pet. Cert. App. A-21.

SUMMARY OF ARGUMENT

The use and enjoyment of private property is a fundamental right, and important to a democratic society. The takings clause was designed to protect this core value.

This Court has long recognized that limitations on the exercise of rights in private property are as much "takings" as are physical invasion of property. Government regulation tends to become ubiquitous, and government constantly develops new and artful ways to appropriate rights to use and enjoy private property for the "public good." Unless constrained by a requirement to compensate owners of private property, in a majoritarian system, government agencies will allocate disproportionate burdens of achieving public purposes to politically weak segments of the citizenry.

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[5] The Florida Supreme Court incorrectly court assumed that in *Nollan* and *Dolan* the land-use agencies had issued permits after actually taking the exacted property. In fact, in both *Nollan* and *Dolan* the agencies had imposed the exactions *prior* to issuance of the permits, similar to the case at bar.

The District's demand that Koontz finance improvements to its property as a condition of permit approval in addition to giving up almost 75% of his land was an exaction implicating the Takings Clause, triggering review under *Nollan* and *Dolan*. When Koontz refused to waive his right to compensation for the cost incurred making the off-site improvements, the District denied his permits.

The Takings Clause does not allow the government limitless power to confiscate property of any kind simply because it holds the power to grant or deny issue land use permits. The Takings Clause generally prohibits uncompensated takings, but the Court in *Nollan* recognized a narrow exception to that general rule: In the land use context, the government may exact property without compensation as a condition of permit approval, but only when the exaction has an "essential nexus" to the adverse impact of the proposed land use. Any other imposed condition is an unlawful attempt to evade the Constitution's prohibition on uncompensated takings. In *Dolan* the Court required that any permit exaction must also be "roughly proportional" to the adverse impact of the proposed land use.

The Florida Supreme Court ruled that there was no taking in this case because the District did not succeed in obtaining what it wanted to take and, in any event, it only sought to take money (in addition to most of the Koontz property). This

ruling is premised on the proposition that money is not the type of property protected by the Fifth Amendment; that the Koontz property was not taken when the permit was denied; and that the private property owner must agree to the exaction and actually suffer deprivation of constitutional liberties before a claim can be brought. The state court was wrong on all three counts.

The Florida Supreme Court attempts to limit this Court's teaching in *Nollan* and *Dolan* narrowly to instances in which a government agency has demanded transfer of real property or an interest in real property, has actually obtained such a transfer, and has issued a permit. That parsing of this Court's takings cases misconstrues the facts of those cases and does not bear doctrinal scrutiny. Contrary to the decision of the Florida Supreme Court, nothing in the Takings Clause, *Nollan*, or *Dolan* recognizes a relevant distinction among the *types* of permit exactions subject to the "essential nexus" and "rough proportionality" limitations; whether the demand is for transfer of either real or personal property, it is subject to the same nexus and proportionality limitations. The District's demands on Koontz had neither the requisite nexus nor the required proportionality, as the trial court found.

The constitutional limitations on government's power to exact property in exchange for a government permit also does not depend upon *when* in the permit process the exaction is imposed. A decision to deny a permit application

because the property owner refuses to accede to an unlawful exaction and a decision to approve a permit application subject to acceptance of an unlawful exaction are substantively indistinguishable. In both cases, no permit issues unless and until the property owner agrees to surrender his right to compensation for the confiscated property.

The Florida Supreme Court's decision ignores reality and the logic of *Nollan* and *Dolan*. The distinctions the Florida Supreme Court drew are artificial and arbitrary. Bare uncompensated confiscation of land is rare because it would constitute an apparent violation of the Takings Clause. However, local and state governments increasingly resort to confiscating property other than interests in real property; most frequently land use regulators demand money, in the form of financing of public projects (as in this case) or payment of fees in lieu of land dedication. The property owner is required, as a permit condition, to waive his right to compensation for the confiscation. If the Florida Supreme Court's decision stands, that constitutional violation will not have a remedy.

ARGUMENT

I.

REGULATORY LIMITS ON ECONOMIC USE OF PROPERTY ARE AS MUCH "TAKINGS" AS ARE PHYSICAL APPROPRIATIONS

A. Regulatory Limitations on Use of Property Are Takings.

The use and enjoyment of private property is a fundamental right, and important to a democratic society. The Takings Clause was designed to protect this core value.

Private property and its protection are important building blocks of democracy. Private property helps distinguish individuals' interests from those of the state, and thus acts as a limit on state power.[6]

B. Denial of Permission to Use Property Is a Denial of Property Rights.

The Florida Supreme Court missed the underlying constitutional violation by focusing on the nature of the exaction and the District's failure

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[6] For the central importance of private property to the creation and preservation of democracy in the inevitable tension between the individual and government, *see* John Locke, OF CIVIL GOVERNMENT ¶¶ 135, 138 (1690); Max Weber, "Politics as a Vocation" in H. H. Gerth and C. Wright Mills, eds., FROM MAX WEBER, ESSAYS IN SOCIOLOGY 78 (Galaxy ed. 1958).

to successfully leverage the police power for monetary gain.

The right to use private property is not a privilege to be granted or withheld at the whim of local government agencies. Rights in property lie at the core of the Constitution and the liberties it seeks to protect. *Dolan*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

The right to property – to control, use, and exclude – is not only rooted in the Constitution, *see* U.S. Const. amend. V and XIV, but it is part and parcel of the first principles of republican government. Blackstone characterized property as an absolute right consisting of "free use." William Blackstone, 1 *Commentaries on the Laws of England* 134-35 (Univ. of Chicago Press 1979). This point was well understood by the founding generation. *See* THE WRITINGS OF SAMUEL ADAMS (Harry Alonzo Cushing, ed. 1904) reprinted in 5 THE FOUNDERS' CONSTITUTION, Doc. 9 (Univ. of Chicago Press 1979).

The colonists brought their views of individual rights in property with them from England. William Blackstone noted that the right to property is an "absolute right, inherent in every Englishman . . .which consists of the free use, enjoyment, and disposal of all his acquisitions,

without any control or diminution, save only by the laws of the land." 1 COMMENTARIES ON THE LAWS OF ENGLAND 135.

The belief that individual rights in property were the key to other personal rights was recognized by the Founders as being a primary concern of government. James Madison commented on the compelling importance of protecting property rights and human faculties: "The protection of these faculties is the *first object* of government. From the protection of different and unequal faculties of acquiring property, the possession of the different degrees and kinds of property immediately results." The Federalist No. 10, at 74 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). The differing and diverse "faculties of men," from which property rights "originate," require protection from unjust interference by both government and private action. *Id.*; *see also* The Federalist No. 70, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (expressing the need for a strong executive for the "protection of property" and "security of liberty").

The Founders believed that individual rights in property are the basis for all other rights, whether it is speech, religion or any other right held by individuals. John Adams emphasized, "Property must be secured, or liberty cannot exist." *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851). Madison summarized this view as a person has a right to property and also property in his rights:

> A man's land, or merchandize, or money is called his property. A man has property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions . . . he has a property very dear to him in the safety and liberty of his person.

James Madison, *On Property*, Mar. 29, 1792, in William T. Hutchinson, *et al.* (eds.), 14 The Papers Of James Madison 266-68 (, 1977). John Rutledge, delegate of South Carolina, argued that "property was the main object of Society." 1 *The Records of the Federal Convention of 1787* 534 (Max Ferrand ed., Yale Univ. Press rev. ed. 1937). Alexander Hamilton remarked that, without this "main object," "adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." *The Defense of the Funding System*, *in* Harold C. Syrett (ed.), 19 The Papers Of Alexander Hamilton 47 (1973).

As Professor Harry V. Jaffa, a preeminent scholar of the American Founding and Civil War, noted, "For [President] Lincoln (following the Founding Fathers), the origin of the right of property, antecedent to civil society, was the natural right of every man to own himself and thus to own the product of his labor." A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR 320 (2000). The Founders recognized that an individual's "dominion over his property is absolute because" all persons have

dominion over themselves and their own faculties. *Id.* at 24.

The right to property is the civil and natural right that protects and guarantees all other rights. The primary "object of government" is to protect the property rights of every American, especially when the laws promote interference with these rights. The "interdependence" between these two rights requires protection for both, without either losing to the other. *Lynch*, 405 U.S. at 552.

The constitutionally protected individual right in property is not an abstract right to bare ownership. It is a right to use. Mere possession may be a sufficient right for Eagle feathers and works of art. *Andrus v. Allard*, 444 U.S. 51, 66 (1979). That is not, however, sufficient for real property. Property was described as the "third absolute right, inherent in every Englishman." William Blackstone, 1 Commentaries on the Laws of England at134-35; *VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 310 (1795). The absolute individual right of property is not mere ownership, but "consists in the free use, enjoyment, and disposal of all his acquisitions." Blackstone, *supra*.

The requirement of a permit regulates so as to prevent "noxious" uses of property. *Mugler v. Kansas*, 123 U.S. 623, 665 (1887); *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. at 1010 (1992). That permitting power was never meant to provide an opportunity for state and local entities to sell permits for the exercise of a right. *Nollan*, 483 U.S.

at 833 n.2 ("the right to build on one's own property-even though its exercise can be subjected to legitimate permitting requirements-cannot remotely be described as a 'governmental benefit.'"). Land is not held subject to a state power of prohibiting all use. *Lucas*, 505 U.S. at 1027-28.

When the water district in this case sought exact money for improvements unrelated to any impact of Koontz's project using its permitting authority, it deprived Koontz of the right to use his property and it violated the constitutional prohibition of taking without compensation.

In a typical regulatory takings case, a government agency adopts a measure that severely restricts the ability of the landowner to productively use her land, whether by rezoning, denials of permits or variances, density limitations, etc. *See, e.g., San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

As this Court perceived in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992) :

> regulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, by requiring land to be left substantially in its

> natural state – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

To similar effect, this Court held in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) that private property cannot cavalierly be commandeered without payment simply "because the public wanted it very much." As that Court perceptively put it, "[T]he question at bottom is upon whom the loss of the changes desired should fall." *Id.*, at 416.

As Chief Justice Rehnquist wrote in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987):

> It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

First English, 482 U.S. at 318-319 (citations omitted). Chief Justice Rehnquist recognized the need to balance the interest of governments in protecting the public interest and the Constitution's overarching purpose in protecting the rights of individuals *as against* government power:

> We realize that even our present holding will undoubtedly lessen to some extent the

> freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S., at 416, 43 S.Ct., at 160.

First English, 482 U.S. at 321-322.

Justice Scalia, finding that a taking had occurred in *Nollan,* reasoned that even if the California Coastal Commission's policy was sound, it does not follow that coastal residents "can be compelled to contribute to its realization . . . . [I]f [the Commission] wants an easement across the Nollans' property, it must pay for it." *Nollan*, 483 U.S. at 841.

When regulations deny an owner the use of his land through the exercise of the police power, whether it is a physical invasion or a regulatory limitation, there is no effective difference. In both

situations, the owner is deprived of the use and enjoyment of the land, and it is that deprivation, not the acquisition of title by the government, that constitutes a taking.

> [T]he deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

When government action interferes with or substantially limits, the ability of a property owner to use his land in an economically viable way a taking has occurred and compensation is due:

> The language of the Fifth Amendment prohibits the "tak[ing]" of private property for "public use" without payment of "just compensation." As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered. This Court has consistently

> recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking," compensation *must* be awarded."

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981)(hereafter "*San Diego Gas & Elec. Co.*")(Brennan, J., dissenting; citations and internal quotation marks omitted; emphasis in original.)

Federal, state and local government agencies have developed new forms of regulation that make it difficult to discern clear boundaries between private property and what belongs to the community. Government entities constantly develop new and artful ways to appropriate rights to use and enjoy private property for the "public good."

The traditional common law distinctions between private property and state power have blurred as federal agencies, states, counties, cities and other local government units perform more functions – many of them "proprietary" in nature – to use property ownership to achieve governmental objectives, and to establish new forms of regulation through licenses, franchises, development subsidies, etc.

Unless constrained by a requirement to compensate owners of private property, in a majoritarian system government agencies will unfairly allocate disproportionate burdens of

achieving public purposes to politically weak segments of the citizenry.

Justice Brennan recognized the ubiquitous nature of takings. He did this both in equating regulatory takings and physical invasion. Government actors occasion losses in both regulatory and physical invasion cases.

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. . . .It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a de facto exercise of the power of eminent domain, when the effects completely deprive the owner of all or most of his interest in the property.

San Diego Gas & Elec. Co., 450 U.S. at 652-53 (Brennan, J., dissenting).

Ownership consists of three separate incidents: possession, use, and disposition. As the Court in *United States v. General Motors Corp.* expressed it:

> The critical terms [of the Takings Clause] are "property," "taken" and "just compensation." [These terms] have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.

323 U.S. 373, 377-378 (1945).

Professor Richard A. Epstein argues, and *amici* urge on this Court, that nearly all regulatory restrictions on the use and disposition of private property should be seen as prima facie takings. R. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 57 (1985). ". . . [P]ossession, use and disposition do not form a random list of incidents; they form the core of a comprehensive and coherent idea of ownership." R. Epstein, *id.* at 60. If government removes or diminishes the rights of the owner in any of the incidents of ownership, "it has prima facie brought itself within the scope of the eminent domain clause, no matter how small the alteration and no matter how general its application." *Id.* at 57. In Professor Laurence Tribe's plain English statement, ". . . forcing someone to stop doing things with his property – telling him "you can keep it, but you can't use it" – is at times indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else."

(Laurence Tribe, AMERICAN CONSTITUTIONAL LAW § 9-3 at 593 (2d ed. 1988)).

Property owners have a right to build on their property, subject only to reasonable regulation. "[T]he right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a "governmental benefit." *Nollan*, 483 U.S. at 845 n.2.

The Takings Clause prohibits uncompensated takings of property. U.S. Const. amend. V; *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003). The Takings Clause protects the right to "exercise[] . . . dominion" over, and "possess, use, and dispose" of, one's property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (regulation denying landowner all economically beneficial use of his property violated Takings Clause). Money is, quintessentially, a form of property. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980)(The principal sum deposited in court plainly was private property, and not the property of Seminole County, and the earnings of the fund are incidents of ownership of the fund itself, and are property just as the fund itself is property.)

C. Government Attempts To Take Property Through the Land Use Permitting Process Are Takings Subject to *Nollan* and *Dolan* Limitations.

The District conditioned the issuance of permits on Koontz's agreement to finance improvements on government-owned property, unrelated to any environmental impact Koontz's proposed project would have. Pet. Cert. App. A-6. The District demanded that Koontz "donate" his money to making unrelated improvements to public property, without compensation.

Nollan and *Dolan* stand for the proposition that the Takings Clause allows the government to confiscate property as a condition of permit issuance only under strict limitations: a government actor can take an easement in property, if the exaction bears an "essential nexus" to the impact of their house on the community (*Nollan*, 483 U.S. at 837); and the government can take land only if exaction is "roughly proportional" to impact of the project (*Dolan*, 512 U.S. at 391).

Permit conditions that exceed these limitations, such as those in this case, are unconstitutional conditions. *See, e.g.*, *Dolan*, 512 U.S. at 385 (describing unconstitutional conditions in the land use context).[7]

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[7] *Nollan* and *Dolan* can be seen as "a special (continued...)

Nollan and *Dolan* establish two related constitutional guidelines: The Takings Clause allows government to take property by permit exaction only if the exactions bear an "essential nexus" and "rough proportionality" to the adverse impact of the property owner's proposed use of his land. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391. When there is an insufficient connection between the adverse impact and the exaction, the imposition of an exaction runs afoul of the Takings Clause prohibition of uncompensated takings.

A permit condition precedent that denies the property owner an incident of ownership without meeting the *Nollan/Dolan* criteria denies the constitutional rights to make reasonable use of one's land, and the right to be compensated for an illegitimate limitation on that use. *Nollan*, 483 U.S. at 833 n.2 (a permit to build upon one's land is a right, subject to legitimate regulation); *Lucas*, 505 U.S. at 1014.

This Court based the *Nollan/Dolan* limitations on the Takings Clause. An exaction that fails the "essential nexus" and"rough proportionality" tests is an unconstitutional condition because it unlawfully requires the property owner to waive the right to compensation for a taking. *Dolan*, 512 U.S. at 385. These cases make no distinction

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[7](...continued)
application of the doctrine of unconstitutional conditions," *Lingle*, 544 U.S. at 547 (internal quotation marks omitted).

among the kinds of property that government attempts to confiscate through the permit process or the timing of the attempted exaction.

In the case at bar, the District took the position that no permit would be issued unless Koontz gave up 11 acres of his land and paid a significant sum of money for improvements to the District's located miles away.[8] This is precisely the kind of taking that *Nollan* and *Dolan* held to be unconstitutional.

If the holdings in *Nollan* and *Dolan* were be limited – as the Florida Supreme Court did – so as to exempt exactions to which the property owner refuses to buckle, thus short-circuiting the taking and to exempt exactions than those directly tied to the real property being "regulated," the potential for government abuse of the permit process would be virtually unlimited. With the proliferation of regulatory agencies with jurisdiction over land use, the opportunity for mischief is great. This is especially true when governments are in financial straits, the usual taxing powers are met with citizen hostility (or outright prohibition, as exemplified by various "tax cap" measures adopted from New York to California) and various government agencies – state and local – will be tempted to use permit fees and other monetary exactions to fund "ordinary" government

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[8] The District did not challenge the trial court's factual finding that no connection existed between the off-site-improvement demand and the impact of the Koontz project, Pet. Cert. App. B-6/

operations because money is the ultimate fungible form of property.

The Florida Supreme Court concluded that applying *Nollan* and *Dolan* to permit exactions would limit the flexibility of the government to regulate development. Pet. Cert. App. A-19–A-21. This argument has not been accepted by this Court. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court considered whether adherence to the constitutional mandates limiting takings might unduly reduce the flexibility of land-use agencies in the permit process.[9] The

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[9] In an *amicus curiae* brief filed in *First English* 23 states and one Commonwealth on behalf of nearly half the states (Alaska, Arkansas, California, Florida, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wyoming, and Puerto Rico) argued that "Adoption of appellant's radical reformulation of takings jurisprudence would cripple amici's ability to perform regulatory functions upon which their citizens' health, safety and welfare quite literally depend." States' *amicus* brief in *First English* at 1-2. The states argued further that "Compelled payment of interim damages. . . would . . . carry the risk of financial chaos for state and local governments; and . . . have a major chilling effect on the regulatory process." *Id.* at 2, and that "[T]he rule urged by appellant could undermine the fiscal well-being of state and local governments. Judicially compelled damages in this context could have major adverse fiscal consequences." *Id.* at 23.

(continued...)

Court made it clear that the convenience of government must yield to constitutional requirements:

> We realize that even our present holding will undoubtedly lessen to some extent the

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[9](...continued)

Similar arguments were advanced by the State and Local Legal Center in its *amicus* brief on behalf of the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the National Governors' Association, the American Planning Association and others in *First English*: "such a decision could paralyze governmental efforts to regulate land use to protect the public health and safety from a host of...injuries....In the wake of such a decision, claims for compensation [would] overload[ ] court dockets and threaten[ ] bankruptcy for state and local governments." Brief of State and Local Legal Center at 3.

The same types of arguments were also made to this Court in *Nollan* by the County Supervisors Association of California, six counties and 46 cities in California: "the Court's decision in this case may affect *amici curiae's* continued ability to regulate land use for the benefit of the public. . . . A finding by this Court that dedication requirements are either permanent physical occupations or lesser physical invasions subject to stricter scrutiny than other regulatory actions is legally insupportable and would have drastic implications." California entities brief at 2.

These arguments simply ignore the point that "Once a court determines that a taking has occurred, the government retains the whole range of options already available--amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *First English*, 482 U.S. at 321.

> freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.

Id. at 321.

Even if constraint on government "flexibility" were a well-founded concern, it is precisely to restrain government "flexibility" that the Constitution and the Bill of Rights were adopted. As this Court observed in *Dolan*: "A strong public desire to improve the public condition [does not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Dolan*, 512 U.S. 374, 396 (internal citation omitted).

D. The District's Permit Conditions Cannot Evade the *Nollan* and *Dolan* Limitations Based on the Timing of the Imposition of the Condition or the Type of Property Interest Demanded.

The Florida Supreme Court held that *Nollan* and *Dolan* apply to permit exactions only when the government "actually issues the permit

sought." Pet. Cert. App. A-19. The court based its holding on the erroneous assumption that in both *Nollan* and *Dolan*, "the regulatory entities *issued* the permits sought with the objected-to exactions imposed." Pet. Cert. App. A. The Florida Supreme Court mistook the procedural posture of *Nollan* and *Dolan*.

Nollan and *Dolan*, and this case all involved challenges to permit exactions imposed prior to permit issuance. In all three cases (*Nollan, Dolan and Koontz*), the government required the permit applicant to dedicate property to public use before it would issue the permits. J.A. 70-71; *Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 379. Like the District, the land use agencies in *Nollan* and *Dolan* did not actually issue any permits to the property owner.

In *Nollan*, the California Coastal Commission issued a Notice of Intent to Issue Permit which stated that the Commission would issue the a coastal development permit only if the Nollans first dedicated an easement to the public. *Nollan*, 483 U.S. at 825, 828. The Nollans challenged the constitutionality of the exaction without recording a deed granting the easement. *Nollan*, 483 U.S. at 828-29.

In *Dolan* the city approved an agency recommendation that it deny the variance and that it condition issuance of the building permit upon Dolan first dedicating flood-plain and bicycle-path easements to the city. Dolan

challenged the constitutionality of the conditions prior to dedicating any property to the city and prior to issuance of any permit. *Dolan*, 512 U.S. at 379.

Nollan and *Dolan* make clear that the relevant inquiry focuses on the substance of the government's action, not its timing or form. The constitutional violation occurs when the government entity makes the unlawful demand of the permit applicant. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 390. Applying *Nollan* and Dolan where a permit is denied specifically because of the applicant's refusal to accede to an excessive exaction is consistent with the unconstitutional conditions doctrine. *Lingle*, 544 U.S. at 547.

E. The District's Permit Conditions Are Subject to the *Nollan* and *Dolan* Limitations Regardless of the Type of Property Exacted.

The Florida Supreme Court held that *Nollan* and *Dolan*did not apply to the District's requirement that Koontz pay for improvements to the District's property, because, according to that court, those cases apply only to exactions of interests in real property. Pet. Cert. App. A-19. The Florida court's holding ignores this Court's Takings Clause jurisprudence, and the logic and purpose of the unconstitutional conditions doctrine.

As discussed *supra*, the Takings Clause broadly protects "private property," not only interests in real property. The Takings Clause limits the government's power to take property, without distinguishing among the different kinds of property, and there is no principled reason why the limitations articulated in *Nollan* and *Dolan* should not apply to all types property, both real and personal. Neither decision confines the "essential nexus" and "rough proportionality" limitations to dedications of realty.

The Florida Supreme Court erred when it held that the unconstitutional conditions doctrine applies only to mandatory dedications of real property. The doctrine applies in all cases in which government demands the waiver of a constitutional right, including the right to compensation.

II.

THE DISTRICT IMPOSED UNCONSTITUTIONAL CONDITIONS ON USE OF THE KOONTZ PROPERTY

Whether viewed as a "taking" or a due process/unconstitutional conditions violation, the water district violated Koontz's property rights and the measure of damages is the same – cash value of the property or temporary takings damages and the permit to use the property.

A. Requiring Payment as a Condition for Exercise of Constitutional Rights Violates the Unconstitutional Conditions Doctrine.

Florida and several other state courts have mistakenly ruled that monetary exactions do not raise concerns under the Takings Clause. A state that seeks to withhold a discretionary permit until a property owner pays a price in either land or cash cannot argue that this leveraging of its police power is free from constitutional scrutiny. *See Speiser v. Randall*, 357 U.S. 513, 525-27 (1958). First, the idea that money is not itself protected by the Takings Clause was decisively rejected by this Court more than three decades ago. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161-62 (1980). A state cannot demand cash payments any more than it can require real estate as the price for a permit. If a state has no power to prohibit an action, speech or property development, it cannot accomplish the prohibition through the imposition of conditions. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Abood v. Detroit Board of Educ.*, 431 U.S. 209, 226 (1977).

The demand that the citizen surrender the constitutional right in property as the price of a permit is an "unconstitutional condition." *Home Ins. Co. of New York v. Morse*, 87 U.S. 445, 451 (1874); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Illinois*, 391 U.S. 563, 568 (1968).

The district does not escape liability for imposing the unconstitutional condition in an attempt to cash in on its permitting power. *Nollan*, 483 U.S. at 837. It is the imposition of the condition, not the success or failure of compelling the applicant to sign a check or a deed, that is the violation. *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963). Thus, in unconstitutional condition cases, the Court has recognized availability of damage awards, voided the condition, or established a procedure to protect against the condition. When the condition has denied a constitutional right, such as an uncompensated taking, government must either lift the condition or pay compensation. *Nollan*, 483 U.S. at 837. The Court has not required the denial of constitutional rights before action may be taken, however. From the earliest cases on unconstitutional conditions, the Court has allowed the voiding of the condition as a means of protecting the constitutional rights at stake. *Home Ins. Co.*, 87 U.S. at 451. Modern cases have imposed prophylactic procedures to protect against the unconstitutional condition coming to fruition. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310-11 (1986); *Knox v. SEIU*, __ U.S. __, 132 S.Ct. 2277, 2291-93 (2012). The District's failure to obtain the deed and cash payment from property owner here does nothing to obviate the constitutional violation.

CONCLUSION

The Florida Supreme Court's decision would limit this Court's teaching in *Nollan* and *Dolan* to instances in which a government agency has demanded transfer of real property or an interest in real property, has actually obtained such a transfer, and has issued a permit. That parsing of this Court's takings cases misconstrues the facts of those cases and does not bear doctrinal scrutiny.

Contrary to the decision of the Florida Supreme Court, nothing in the Takings Clause, *Nollan*, or *Dolan* recognizes a relevant distinction among the *types* of permit exactions subject to the "essential nexus" and "rough proportionality" limitations; whether the demand is for transfer of either real or personal property, it is subject to the same nexus and proportionality limitations.

The District's demands on Koontz had neither the requisite nexus nor the required proportionality, as the trial court found.

For the foregoing reasons, *amici* urge the Court to reverse the decision of the Florida Supreme Court.

November 28, 2012

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-1447

In The
Supreme Court of the Un...

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF FOR THE STATES OF CALIFORNIA, ALABAMA, CONNECTICUT, HAWAII, ILLINOIS, LOUISIANA, MASSACHUSETTS, MICHIGAN, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, TENNESSEE, UTAH, VERMONT, WASHINGTON, THE DISTRICT OF COLUMBIA, AND THE COMMONWEALTH OF PUERTO RICO, AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF THE AMICI STATES

In many varying permit contexts, states and their local subdivisions frequently use impact or mitigation fees to protect public health and safety and natural resources, as well as to fund basic infrastructure and services. Petitioner's proposed expansion of the Takings Clause to cover such monetary payments "would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts." *E. Enters. v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). The risk of such litigation will place those governments in the uncomfortable position of having to choose between denying otherwise beneficial projects and permitting development to proceed without mitigating its impacts. This would seriously hamper the States' ability to protect the public health and welfare.

Moreover, the impact of subjecting monetary obligations to review under the takings doctrine could go far beyond impact and mitigation fees. That extension would be a significant step towards Takings Clause review of core state activities such as taxation and administration of workers' compensation and unemployment insurance programs.

The States represented here therefore respectfully request this Court reject petitioner's proposed new rule and instead reaffirm that the Takings

Clause does not apply to monetary payments such as impact and mitigation fees.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should decline petitioner's invitation, through the second question presented, to extend the exactions analysis of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) to a government requirement for monetary payment as a condition for a land use permit. The logic underlying this Court's Takings Clause jurisprudence precludes the application of *Nollan* and *Dolan* to such payments. Instead, the courts should continue to review monetary payment requirements under the Due Process Clause.

In *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), this Court provided much needed clarity by disentangling the Takings Clause from the Due Process Clause. *Id.* at 542. Petitioner, however, seeks to reinsert due process concepts into takings law. He does so by equating requirements that individuals convey real property to the public with requirements that individuals make monetary payments. Government's forced acquisition of real or personal property, however, is a per se taking, while requirements that individuals make monetary payments are not. Rather, challenges to monetary payment requirements sound in due process. *E. Enters.*, 524 U.S. at 540 (Kennedy,

J., concurring in judgment and dissenting in opinion); *id.* at 554 (Breyer, J., joined by Justices Stevens, Souter and Ginsburg, dissenting).

Lingle held that the Court's prior statements to the effect that government imposes a taking where its regulation "does not substantially advance legitimate state interests" were wrong. That formula "prescribes an inquiry in the nature of a due process, not a takings, test." 544 U.S. at 537. The Court clarified, however, that its decision did not undermine its holdings in *Nollan*, 483 U.S. 825, and *Dolan*, 512 U.S. 374. *Lingle* explained that in *Nollan*, the Court held that government could demand an easement as a condition for granting a development permit "provided that the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit," and *Dolan* further provided that the demand must be "roughly proportional" to the development's impact. *Lingle*, 544 U.S. at 546-547. *Lingle* stressed, however, that *even though* those cases referred to the "substantially advance" test in their analyses, they are actually a "special application" of the unconstitutional conditions doctrine. *Id.* at 548 (internal citation and quotation marks omitted).

As petitioner acknowledges, this special application is triggered when government seeks to "take property" in a manner that would normally violate the Takings Clause. Pet. Br. 21. It was triggered in *Nollan* and *Dolan* because, in each case, the government sought an easement or fee interest in real

property, which is normally a "per se" taking. *Lingle*, 544 U.S. at 546. That real property appropriation is nevertheless allowed under *Nollan* and *Dolan* if the permit condition is sufficiently related to the proposed development. In sharp contrast, five justices in *Eastern Enterprises* determined that the Takings Clause does not encompass monetary payment requirements. Because monetary payments are not takings, they cannot trigger *Nollan/Dolan* review.

Moreover, even if the Takings Clause did apply to monetary payment requirements, those requirements must be analyzed under this Court's three-factor test established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and that test cannot logically be applied alongside *Nollan* and *Dolan*. Even the four *Eastern Enterprises* justices who expressed the minority view that monetary payments could be reviewed under the Takings Clause concluded that the payments could not be "per se" takings but should instead be reviewed under this Court's three-factor analysis. *E. Enters.*, 524 U.S. at 518. That analysis requires courts to review the regulatory measure's economic impact on the "parcel as a whole," not just a discrete portion of the property. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002). But *Nollan* and *Dolan* are incompatible with the parcel-as-a-whole requirement. The whole parcel is the property that can be developed along with the challenged condition. If the impact on that package amounts to a taking, it violates the Takings Clause even if the nexus and

proportionality required by *Nollan* and *Dolan* exists. If the impact on that package is not a taking, then government has not violated the Takings Clause and *Nollan* and *Dolan* are not applicable.

In addition to doctrinal integrity, policy reasons counsel against extending the Takings Clause to monetary payments. The extension would federalize land use disputes, converting the federal courts into land use boards of appeals. It could also lead to unintended consequences, such as Takings Clause review of redistributive governmental programs, including progressive taxes, Social Security, and Medicare.

In contrast, the Due Process Clause provides a doctrinally sound and measured means for addressing governmental overreaching. It can be used to review abusive conditions without the contortions needed to fit monetary payments into Takings Clause jurisprudence. Moreover, due process' more deferential review acknowledges the many private property protections that states already provide. It also promotes the policy of resolving land use disputes at the state and local levels. As Justice Alito explained, when reviewing an impact fee case while sitting on the Third Circuit, "[l]and use decisions are matters of local concern" and a federal court should not be a "zoning board of appeals." *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 402 (3d Cir. 2003).

ARGUMENT

I. UNLIKE REAL PROPERTY EXACTIONS, MONETARY PAYMENT REQUIREMENTS DO NOT RAISE TAKINGS ISSUES, AND THEREFORE DO NOT TRIGGER *NOLLAN/DOLAN* REVIEW

Monetary payment obligations are not covered by the Takings Clause. As a result, they cannot come within *Nollan* and *Dolan*'s special application of the unconstitutional conditions doctrine.

In *Lingle,* this Court explained that *Nollan* and *Dolan* are based upon the unconstitutional conditions doctrine. *Lingle*, 544 U.S. at 542. That doctrine has two central components. First, and of critical importance to this Court's analysis, in exchange for receiving a benefit from the government, a person must be required to relinquish a constitutional right. *Id.* at 547. In the takings context, that right is the entitlement to compensation for a taking. *Ibid.* Second, the relinquishment is nevertheless constitutional unless it has little or no connection to the government benefit. *Ibid.*; see also Pet. Br. 21-22.

Lingle thus explained that in both *Nollan* and *Dolan*, this Court's unconstitutional conditions analysis "began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking." *Lingle*, 544 U.S. at 546. In contrast, as five justices made clear in *Eastern Enterprises,* 524 U.S. 498, governmental requirements that parties pay money do not trigger takings concerns. Thus, the first necessary step for an

unconstitutional condition in a takings case does not exist with monetary payments.

In *Eastern Enterprises*, this Court reviewed whether a federal statute that imposed retroactive liability on a coal company to fund lifetime benefits for retirees was a taking or violated due process. Although five justices found a constitutional violation (four found a taking, one a due process violation), a "second majority" consisting of Justice Kennedy together with the four dissenters concluded that the Takings Clause did not apply to obligations to pay money. Justice Kennedy reasoned that the challenged act did not involve property protected by the Takings Clause because it did not appropriate land, intellectual property, "or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits." 524 U.S. at 540 (Kennedy, J., concurring in judgment and dissenting in opinion). Although the law imposed "a staggering financial burden on the petitioner," it did not take property. *Ibid.*

The four *Eastern Enterprises* dissenters likewise concluded that the Takings Clause did not apply to "an ordinary liability to pay money." *Id.* at 554 (Breyer, J., joined by Justices Stevens, Souter and Ginsburg, dissenting). Based in significant part on this *Eastern Enterprises* "second majority," the United States Court of Appeals for the Federal Circuit, sitting en banc in *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001), summarized the law as follows: "In short, while a taking may

occur when a specific fund of money is involved, the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Id.* at 1340.

Thus, while permit conditions requiring owners to dedicate a fee interest in property or an easement can be per se takings, and therefore can trigger *Nollan/Dolan* review, this Court has not previously deemed obligations to pay money to be takings. In this case, the Court should adhere to the "second majority" in *Eastern Enterprises* and find that such payments are not takings and thus, such obligations do not trigger *Nollan/Dolan* review.[1]

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[1] Prior to *Lingle*, lower courts were divided as to whether *Nollan/Dolan* review applied to permits conditioned upon the payment of fees. See *Rogers Mach., Inc. v. Wash. Cnty.*, 45 P.3d 966, 976-978 (Or. Ct. App. 2002) (collecting cases). The courts that extended *Nollan/Dolan* review to fees apparently based the extension upon the substantially advances test. See, *e.g.*, *Ehrlich v. City of Culver City*, 911 P.2d 429, 457-458 (Cal. 1996) (Mosk, J., concurring). As *Lingle* clarified, however, *Nollan/Dolan* review rests on the unconstitutional conditions doctrine, as opposed to the substantially advances test. See *W. Linn Corporate Park, L.L.C. v. City of W. Linn*, 240 P.3d 29, 44 (Or. 2010) (rejecting extension of *Nollan/Dolan* on that basis). Since *Lingle*, courts have declined to extend *Nollan/Dolan* review. See, *e.g.*, *ibid.*; *Alto Eldorado P'ship v. Cnty. of Santa Fe*, 634 F.3d 1170, 1178 (10th Cir. 2011) (*Nollan/Dolan* review limited to conditions that amount to "physical per se takings"); *Iowa Assur. Corp. v. City of Indianola*, 650 F.3d 1094, 1099 (8th Cir. 2011) (*Nollan* does not apply to the City's requirement that an owner build a fence to screen his racecars from view; it is limited to conditions that "restrict owners' right to exclude others from their property.").

II. EVEN IF THE TAKINGS CLAUSE COULD BE APPLIED TO MONETARY PAYMENTS, THAT APPLICATION WOULD BE INCOMPATIBLE WITH *NOLLAN/DOLAN* REVIEW

Even if the Court adopted the minority view of the four *Eastern Enterprises* justices that the Takings Clause applies to government-imposed monetary liabilities, those liabilities still should not be reviewed under *Nollan* and *Dolan*. Under the minority view, monetary obligations do not create "per se" physical takings. Rather, they need to be evaluated under *Penn Central*, 438 U.S. 104. However, *Penn Central* and *Nollan/Dolan* are incongruent; they cannot logically be applied in the same case. The government's permit, including the fee condition, either does or does not amount to a taking under *Penn Central*. If it is a taking, *Nollan/Dolan* cannot undo that taking. Conversely, if it is not a taking, there is no predicate for applying *Nollan/Dolan*. Either way, there is no role for *Nollan/Dolan* review.

A. Monetary Payments are Not Per Se Physical Takings

The Court has never held that generalized monetary obligations could be per se physical takings. At most, a minority of the Court has indicated that monetary payments could be analyzed under the Takings Clause as *Penn Central* claims.

In *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), this Court strongly suggested that where a *discrete* fund is involved, a governmental

appropriation of money from that fund can be deemed a per se physical taking. *Id.* at 235. Cases involving generalized obligations to pay money, in contrast, do not meet the requirements for per se takings. The foundation for this principle was laid in *United States v. Sperry Corp.*, 493 U.S. 52 (1989). *Sperry* denied a regulatory takings challenge to a percentage fee the United States deducted from certain monetary awards, where the deduction was designed to offset the government's administrative costs. Citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the private claimant had argued that "the deduction was akin to a 'permanent physical occupation' of its property and therefore was a per se taking requiring just compensation, regardless of the extent of the occupation or its economic impact." *Sperry*, 493 U.S. at 62 n.9. (The claimant did not argue, and the Court therefore did not address, whether the payments could be considered "property" and therefore reviewed under *Penn Central.*)

This Court in *Sperry* unanimously rejected the *Loretto* assertion, stating that "it is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible." 493 U.S. at 62 n.9. The Court went on to explain that "if the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*." *Ibid.*

Moreover, while a majority of justices in *Eastern Enterprises* determined that the Takings Clause does not apply to monetary payments, even the four justices who concluded that it does apply expressly stated that payments are not per se takings. In their words:

> It is clear that the Act requires Eastern to turn over a dollar amount established by the Commissioner under a timetable set by the Act, with the threat of severe penalty if Eastern fails to comply. . . . That liability is not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a per se taking.

E. Enters., 524 U.S. at 529-530. The plurality therefore analyzed the claim "by applying the three factors that traditionally have informed our regulatory takings analysis." *Id.* at 529. Those factors are (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action" ("a physical invasion" as opposed to "adjusting the benefits and burdens of economic life"). *Penn Central*, 438 U.S. at 124.

Thus, at a minimum, all the justices in *Eastern Enterprises* agreed that, where no specific fund of money is involved, governmental requirements that people pay money are not per se takings (the four justice plurality and the five justices who concluded that the Takings Clause never applies). At most,

monetary payment requirements might be takings under a *Penn Central* analysis, which focuses on a regulation's economic impact. But that analysis is incompatible with *Nollan* and *Dolan*.

B. *Nollan* and *Dolan* Cannot Logically be Applied to *Penn Central* Claims

Even if generalized obligations to pay money could be reviewed under the Takings Clause, applying *Nollan* and *Dolan* to a permit condition requiring a monetary payment or expenditure does not make any sense. In contrast to conditions requiring physical dedications of property, those calling for monetary payments would need to be analyzed under the parcel-as-a-whole rule. Unlike *Nollan* and *Dolan* where the taking at issue was the *permit condition*, under the parcel-as-a-whole rule the question is whether the economic burden of government requirements amounts to a taking of the *entire parcel*. If that economic burden results in a taking of the parcel, there is a taking regardless of the application of *Nollan/Dolan* to the permit condition. On the other hand, if the permit condition does not take the parcel as a whole, there is no taking and *Nollan/Dolan* review does not apply.

For permanent physical occupations – such as the real property dedications mandated in *Nollan* and *Dolan* – even a very limited acquisition is a taking. Thus, as this Court explained in *Tahoe-Sierra*, "when the government appropriates part of a rooftop

in order to provide cable TV access for apartment tenants . . . it is required to pay for that share no matter how small." 535 U.S. at 323. The Court does not look at whether the imposition is on the whole parcel. Imposition on only a limited portion is sufficient. According to *Tahoe-Sierra*, "when the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Id.* at 322.

The rule concerning economic takings, however, is very different. As *Tahoe-Sierra* pointed out, *Penn Central* itself made it clear that these claims "must focus on the 'parcel as a whole.'" *Tahoe-Sierra*, 535 U.S. at 327. Based upon the parcel rule, *Tahoe-Sierra* held that a regional planning agency's temporary moratorium on development did not impose a categorical economic taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), because the properties in question retained value as a result of their potential for use in the future. *Tahoe-Sierra*, 535 U.S. at 332. The Court explained that the parcel rule not only has a "geographic" ("metes and bounds") dimension but also a "temporal" dimension (period of time covered by the ownership interest in property). *Id.* at 331-332. Courts must look to the entirety of those interests in evaluating the economic impact of a challenged regulation. *Id.* at 332.

The parcel-as-a-whole rule makes application of *Nollan/Dolan* to monetary exactions illogical because

under that rule a monetary payment imposed as a condition of receipt of a permit for development results in a taking only if the economic burden is so great that the entire parcel is effectively taken. Where, for example, government issues a permit for a landowner to build a store, and conditions the permit on the owner's payment of a traffic mitigation fee, a court needs to look at whether government action's impact made the property valueless (for a *Lucas* taking), or amounted to a *Penn Central* taking.[2]

If a court concludes that there is a taking after reviewing the impact of the permit on that package, that ends the analysis. A taking of the *entire parcel* exists that cannot be undone by applying a *Nollan/Dolan* evaluation of the *permit condition*. Even if there is a "nexus" and "rough proportionality" between the fee and the underlying project's impacts, the governmental action has taken the property. Conversely, if a government restriction does not impose a taking on the parcel as a whole, then the property owner has failed to meet the predicate for applying a *Nollan/Dolan* unconstitutional conditions analysis: the imposition of a condition that, absent an adequate connection to the underlying project's impacts, would

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[2] Isolating the payment condition from the parcel would pose a second problem. The economic impact of the payment when considered by itself would be total, amounting to a per se taking under *Lucas*, 505 U.S. 1003. As reviewed earlier (see p. 9, *supra*), however, even the minority of *Eastern Enterprises* justices who viewed monetary payments as potential takings concluded that they are not per se takings. 524 U.S. at 529-530.

constitute a taking. Having failed to show that a condition violated the Constitution by taking property, there is no Takings Clause justification for applying *Nollan/Dolan* to review the condition's relationship to the project.

Thus, the *Nollan/Dolan* analysis works where a condition imposes a physical taking. But even if monetary payments could be deemed property under the Takings Clause, *Nollan/Dolan* review would be illogical.

Respondent's suggestion that petitioner pay for off-site mitigation could not, therefore, have been a taking. Consequently, *Nollan* and *Dolan* are inapplicable. As we discuss below, however, property owners could challenge allegedly abusive permit conditions under the Due Process Clause. But first, the States will demonstrate that in addition to being doctrinally unsound, expanding *Nollan* and *Dolan* to cover monetary impositions would have highly undesirable impacts.

III. EXPANDING *NOLLAN/DOLAN* TO COVER MONETARY IMPOSITIONS WOULD FEDERALIZE LOCAL LAND USE DECISIONS AND POTENTIALLY EXPAND THE TAKINGS CLAUSE TO COVER TAXES AND BENEFIT TRANSFER PROGRAMS

A majority of *Eastern Enterprises* justices firmly rejected the notion that requiring a generalized monetary payment can amount to a taking. Reaching any

other conclusion, and thereby expanding *Nollan/Dolan*'s reach to encompass impact fees and similar monetary payments, would federalize a plethora of land use decisions. It could also greatly expand takings jurisprudence by unintentionally covering some of our most basic governmental functions, including taxation, Social Security, and Medicare.

A. Applying the Takings Clause to Monetary Payments would Federalize Local Land Use Decisions

Impact fees on developments are used by a large percentage of localities across the nation "to help offset the costs of the infrastructure (water and sewer lines, roads, school and other services) needed to support development." U.S. Gen. Accounting Office, *Local Growth Issues – Federal Opportunities and Challenges* 33 & 102 (2000), *available at* http://www.gao.gov/assets/240/230572.pdf (major survey of cities and counties found that 59 percent of responding cities and 39 percent of responding counties charged impact fees). State and local government agencies often condition approval of development projects on the provision of funds supporting adequate infrastructure and other various public goods and services related to the proposed development, including roads, bridges, and sidewalks; flood control; sewage collection and treatment; solid waste treatment and storage; water treatment and supply; police and fire protection; public transit; schools; libraries; recreational facilities;

parks and open space; affordable housing; public art; and childcare.[3]

Furthermore, to offset harm caused by proposed projects, state and local governments widely condition approvals on mitigation, often in the form of mitigation fees. Such mitigation fees often arise in the context of protecting and preserving natural resources. State and federal environmental laws require

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[3] A majority of States have statutes expressly authorizing and limiting the use of impact fees, including Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Maine, Maryland, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Clancy Mullen, *State Impact Fee Enabling Acts* 1, Table 1 (Aug. 21, 2012), *available at* http://www.impactfees.com/publications%20pdf/state_enabling_acts.pdf; see also n.5, *infra*, and accompanying text. The statutes vary in terms of purposes for which impact fees are authorized. For example, Illinois authorizes impact fees for roads in very narrow circumstances, 605 Ill. Comp. Stat. Ann. § 5/5-901, while other states authorize impact fees for particular categories of improvements, *e.g.*, Ariz. Rev. Stat. Ann. § 11-1102 (roads, sewer, parks, flood control), while still others are unrestricted in terms of the purposes for which the fee may be imposed, *e.g.*, Vt. Stat. Ann. tit. 24, § 5204. Local governments throughout the country have adopted ordinances pursuant to these statutes or other authorities vested in them by the States, imposing impact fees relating to affordable housing, public transit, and the various facilities and services listed above. See, *e.g.*, *Holmdel Builders Ass'n v. Twp. of Holmdel*, 583 A.2d 277, 279-280 (N.J. 1990) (townships employing impact fees to meet affordable housing mandate); S.F., Cal., Planning Code § 411 (fee used to fund public transit); Fayetteville, Ark., Unified Development Code §§ 159.02, 159.03, 159.04 (fees for water, wastewater, police, fire, and public safety).

mitigation for impacts to natural resources including wetlands, endangered species, and water quality. *E.g.*, Cal. Pub. Res. Code §§ 21002.1(a) & 21100(b)(3)[4] (requiring mitigation for environmental impacts); Conn. Gen. Stat. Ann. § 22a-41 (including mitigation as factor for consideration in issuing wetland permits); Mich. Comp. Laws Ann. § 324.30311d (authorizing mitigation as a condition for wetland permits); N.J. Stat. Ann. § 13:9B-13 (same); Cal. Fish & Game Code § 2081 (requiring impacts to endangered and threatened species be fully mitigated as a condition to permits authorizing the take of species); Wis. Stat. Ann. § 29.604 (West, Westlaw through 2011 Legis. Sess. published Apr. 26, 2012) (same).

The types of permits that state and local government agencies issue that might include impact fees or mitigation requirements are extensive, including, for example, permits for development and redevelopment, *e.g.*, N.C. Gen. Stat. Ann. § 113A-118 (coastal development); subdivisions, *e.g.*, Cal. Gov't Code, §§ 66410-66499.38, Or. Rev. Stat. Ann. §§ 92.010-92.179; power plants, *e.g.*, Cal. Pub. Res. Code § 25500; mining, *e.g.*, Me. Rev. Stat. Ann. tit. 38, § 490-PP (West, Westlaw through 2011 2d Reg. Sess. of 125th Leg.) (effective June 1, 2014); lake and streambed alteration, *e.g.*, Cal. Fish & Game Code § 1602, Mich. Comp. Laws Ann. § 324.30102; encroachment on waterways and

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[4] All references to state statutes are to the West version from Westlaw, current through the 2012 Legislative Session, unless otherwise indicated.

levees, *e.g.*, Cal. Water Code § 8710, Conn. Gen. Stat. Ann. § 22a-342; incidental take of endangered species, *e.g.*, Cal. Fish & Game Code § 2080, Me. Rev. Stat. Ann. tit. 12, § 12808 (West, Westlaw through 2011 2d Reg. Sess. of 125th Leg.); hazardous waste facilities issued by state agencies under the federal Resource Conservation and Recovery Act, 42 U.S.C. § 6926, *e.g.*, Cal. Health & Safety Code § 25200; N.Y. Envtl. Conserv. §§ 27-0101, 27-0707; dredge and fill permits issued by state agencies authorized under the Clean Water Act § 404, 33 U.S.C. § 1344(g); and National Pollutant Discharge Elimination System (NPDES) permits issued by state water pollution control agencies authorized pursuant to the Clean Water Act § 402, 33 U.S.C. § 1342(b).

This Court would respect the role of states and their subdivisions in governing land uses by not extending the Takings Clause's exaction doctrine to cover these and other monetary payment requirements. Reviewing a similar request to interpret the Constitution in an expansive manner, Justice Alito, while sitting on the Third Circuit, explained that absent a high threshold for establishing a constitutional violation, courts would be "cast in the role of a 'zoning board of appeals.'" *United Artists Theatre Circuit*, 316 F.3d at 402 (citations omitted) (reviewing due process allegation that town fatally delayed approving permit because developer refused to pay impact fee).

Federalizing these local decisions would, among other things, discourage governments from choosing

the very useful middle-ground of allowing development but mitigating its impacts through fees. Instead, to avoid risk, governments would be encouraged to choose one of two extremes: denying development, or approving it without addressing its impacts. Local governments in particular are risk adverse, which "results in their discounting the benefits and placing a premium on the costs of their actions." Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. Rev. 1624, 1666 (2006). Takings lawsuits can be particularly intimidating. The former chief lobbyist for the National Association of Home Builders went so far as to characterize a proposal to increase developers' ability to bring takings lawsuits in federal court as "a hammer to the head" of state and local officials. Timothy J. Dowling, *On History, Takings Jurisprudence, and* Palazzolo*: A Reply to James Burling*, 30 B.C. Envtl. Aff. L. Rev. 65, 83 (2002). A small town threatened with a federal takings lawsuit would not only need to assess the cost of losing, but also the cost of winning – such as having to absorb potentially crushing attorneys' fees incurred for its successful defense. (See, *e.g.*, William C. Smith, *The Brawl Over Sprawl,* A.B.A. Journal, Dec. 2000, at 52 (describing how Hudson, Ohio had to spend $250,000 to successfully defeat a takings lawsuit).

Rather than expanding the reach of the Takings Clause, property owners should be encouraged to use existing procedures for challenging improper permit conditions. In the instant case, for example, petitioner

"did not appeal or seek administrative review of the District's action." Resp. Br. in Opp. 16 (citing Pet. App. A-22). Yet the laws in many, if not most, states already protect land owners from improper monetary impositions.[5] State laws also typically provide an

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[5] See, *e.g.*, Ariz. Rev. Stat. Ann. § 9-463.05 (Arizona local government fees must provide "beneficial use" to the development and "shall not exceed a proportionate share" of the cost of services); Cal. Gov't Code § 66001 (California local government fees must satisfy a "reasonable relationship" test); Colo. Rev. Stat. Ann. § 29-20-104.5 (Colorado local government fees must be "directly related to proposed development"); Fla. Stat. Ann. § 163.31801 (Florida local government fees must be based upon "localized data"); Ga. Code Ann. § 36-71-4 (Georgia local government impact fees limited to "proportionate share" of improvements); Haw. Rev. Stat. § 46-143 (Hawaii local government fees must be based upon development's "proportionate share" of costs"); Idaho Code Ann. § 67-8207 (similar approach in Idaho); 605 Ill. Comp. Stat. Ann. 5/5-906 (Illinois local government traffic impact fees "must be specifically and uniquely attributable to the traffic demands generated by" the development); Ind. Code Ann. § 36-7-4-1321 (Indiana local government fees must be based upon "proportionate share" of infrastructure costs to serve development); Me. Rev. Stat. tit. 30-A, § 4354 (West, Westlaw through 2011 2d Reg. Sess. of 125th Leg.) (Maine local government fees must meet a "reasonably related" test); Md. Code Ann., art. 25B, § 13D (Maryland home rule county impact fees must be "required to accommodate new construction or development"); Mont. Code Ann. § 7-6-1602 (West, Westlaw through 2011 Laws, Code Comm'r changes, and 2010 ballot measures) (Montana local government impact fees must be "reasonably related to" and "proportionate" to costs to accommodate the development); Nev. Rev. Stat. Ann. § 278B.230 (West, Westlaw through 2011 76th Reg. Sess.) (Nevada local government fees established through strict statutory process and formula); N.H. Rev. Stat. Ann. § 674:21 (New Hampshire local government fees must meet a "reasonably related" test); N.J. Stat. Ann. § 40:55D-42 (New

(Continued on following page)

opportunity for aggrieved parties to seek judicial review of administrative actions as arbitrary and

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Jersey local governments may charge developers "reasonable and necessary" costs of improvements required by development); N.M. Stat. Ann. § 5-8-7 (New Mexico local government impact fees limited to "proportionate share of the cost of system improvements . . . needed to serve new development); 53 Pa. Cons. Stat. Ann. § 10502-A (Pennsylvania local government impact fees must be for transportation costs "necessitated by and attributable to new development"); R.I. Gen. Laws Ann. § 45-22.4-5 (Rhode Island local impact fees must meet a "reasonably related" test); S.C. Code Ann. § 6-1-940 (South Carolina local government impact fees must be for costs that are "proportionate" and "attributable to" the development); Tex. Loc. Gov't Code Ann. § 395.015 (West, Westlaw through 2011 Reg. Sess. and 1st called Sess. of 82nd Leg.) (Texas local government impact fees cannot exceed a set formula); Utah Code Ann. § 11-36a-304 (Utah local government impact fees must meet "reasonably related" and "proportionate" requirements); Vt. Stat. Ann. tit. 24, § 5203 (Vermont local government impact fees may not exceed "the portion of the capital cost of a capital project which will benefit or is attributable to the development"); Va. Code Ann. § 15.2-2319 (Virginia local government impact fees allowed to pay for "reasonable road improvements that benefit the new development"); Wash. Rev. Code Ann. § 82.02.060 (Washington State local government impact fees must be based upon development's "proportionate share" of costs); W. Va. Code Ann. § 7-20-4 (West Virginia local government impact fees must meet "proportionate share" and "reasonable benefit" requirements); Wis. Stat. Ann. § 66.0617 (West, Westlaw through 2011 Act 286, published Apr. 26, 2012) (Wisconsin local government impact fees must meet "rational relationship" and "proportionate" requirements). Given these restrictions, it is not surprising that most litigation challenging impact fees is based upon state statutory grounds. See W. Andrew Gowder, Jr. & Bryan W. Wenter, *Exactions and Impact Fees 2007: The Limits of Local Authority*, 39 Urb. Law. 645, 656 (2007).

capricious.[6] These laws are part of the "web of local and state institutions" that provide a check on government overreaching. Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 Hastings L.J. 729, 770 (2007).

This Court should leave most land use disputes to the States and their courts. The federal judiciary should only review disputes that are allegedly so serious that they violate the Due Process Clause. This is consistent with this Court's unanimous conclusion that "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *San Remo Hotel v. City & Cnty. of S.F.*, 545 U.S. 323, 347 (2005). It also respects the "strong policy considerations [that] favor local resolution of land-use disputes." *Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1291 (3d Cir. 1993).

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[6] See, *e.g.*, Ala. Code § 41-22-20; Alaska Stat. Ann. § 44.62.570; Ark. Code Ann. § 25-15-212; Conn. Gen. Stat. Ann. § 4-183; Del. Code Ann. tit. 29, § 10142; Iowa Code Ann. § 17A.19; Kan. Stat. Ann. § 77-621; Ky. Rev. Stat. Ann. § 13B.150; La. Rev. Stat. Ann. § 49:964 (West, Westlaw through 2011 1st Extraordinary & Reg. Sess.); Mass. Gen. Laws Ann. ch. 30A, § 14; Mich. Comp. Laws Ann. § 24.306; Mo. Ann. Stat. § 536.140; Neb. Rev. Stat. § 84-917; N.Y. C.P.L.R. 7801; Okla. Stat. Ann. tit. 75, § 322; S.D. Codified Laws § 1-26-36; Tenn. Code Ann. § 4-5-322; Wyo. Stat. Ann. § 16-3-114.

B. Applying *Nollan/Dolan* to Monetary Payments Could Expand the Takings Clause to Cover Redistributive Programs such as Taxation and Social Security

In addition to federalizing many land use decisions, expanding the Takings Clause to cover monetary payments could lead to Takings Clause review of basic governmental functions. For example, if an obligation to pay money could be deemed a physical per se taking, then government's ability to impose taxes could be challenged on this ground. As Justice Breyer observed in *Eastern Enterprises*, "[i]f the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.*, when it assesses a tax?" 524 U.S. at 556 (Breyer, J., joined by Justices Stevens, Souter and Ginsburg, dissenting).[7]

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[7] At least one commentator, Professor Richard Epstein, has asserted that progressive income taxes and estate taxes violate the Takings Clause. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 295-305 (1985). Professor Epstein's view has virtually no support. As Professor Edwardo Moises Penalver explained:

> In his book *Takings*, Epstein invited readers to view the conceptual similarity between takings and taxes as a reason to dramatically curtail the state's power to tax. . . . Whatever influence Epstein's theory has had on discussions of takings law generally, few have accepted his invitation to turn their backs on the unqualified power to tax. [Footnote with numerous citations omitted.] . . . The constitutional doctrine

(Continued on following page)

However, if fungible money – as opposed to a discrete account – were deemed to be "property" under the Takings Clause, it could be argued that taxes physically appropriate that property. As such, they could be challenged as per se takings. This Court has never supported such an extreme view of the Takings Clause.

As far back as 1880, this Court explained that "taxation for a public purpose, however great, [is not] the taking of private property for public use, in the sense of the Constitution." *Cnty. of Mobile v. Kimball*, 102 U.S. 691, 703 (1880).[8] More recently in *Penn Central*, this Court emphasized that taxes are not takings: "Government may execute laws or programs that adversely affect recognized economic

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> defining the state's power to tax is so entrenched that it is nearly axiomatic.

Edwardo Moises Penalver, *Regulatory Taxings*, 104 Colum. L. Rev. 2182, 2185-2186 (2004).

[8] In a subsequent due process case, the Court's opinion confused matters slightly by stating that the Constitution's grant of taxing power to Congress would not protect an imposition that "was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24-25 (1916). This passage appears to reflect the Court's conflation, during that era, of due process and takings concepts. See generally William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 Geo. L. J. 813 (1998). This Court emphatically rejected that conflation in *Lingle*, 544 U.S. at 542.

values. Exercises of the taxing power are one obvious example." 438 U.S. at 124. Subsequently, Justice Scalia similarly explained that the Takings Clause's public use requirement does not apply to "taxes and user fees since they are not 'takings.'" *Brown*, 538 U.S. at 242, n.2 (2003) (Scalia, J., dissenting).

Moreover, the unintended consequences of applying the Takings Clause to generalized financial obligations could go far beyond taxes. As takings scholar Professor Steven Eagle warns, such an expansion would be "a considerable step towards judicial receptivity to the argument that the Takings Clause requires courts to enjoin any governmental program that redistributes wealth." Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 1001 (2000). In fact, one commentator advocates just that expansion. See Epstein, *Takings: Private Property and the Power of Eminent Domain* at 245-255 and 306-329 (asserting that the Takings Clause covers and makes suspect programs such as workers' compensation, unemployment insurance, food stamps, Social Security and Medicare).

The States respectfully submit that this Court should avoid the doctrinal contortions and unintended consequences involved in expanding the Takings Clause to cover monetary payments. Instead, the Court should affirm that payment requirements "might be so arbitrary or irrational as to violate due process." *Lingle*, 544 U.S. at 548 (Kennedy, J., concurring).

IV. ABUSIVE PERMIT CONDITIONS CAN BE REVIEWED UNDER THE DUE PROCESS CLAUSE

As five justices pointed out in *Eastern Enterprises*, although monetary payment requirements are not subject to the Takings Clause, they can be reviewed under the Due Process Clause. *E. Enters.*, 524 U.S. at 539 (Kennedy, J., concurring in judgment and dissenting in opinion) (concluding that the retroactive payments required in that case should be reviewed under the Due Process Clause); *id.* at 554 (Breyer, J., joined by Justices Stevens, Souter and Ginsburg, dissenting) (agreeing with Justice Kennedy on that point). This makes sense, because "property" for due process purposes is defined more broadly than it is under the Takings Clause. See generally Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 978-982 (2000) (definition of property is broader for substantive and procedural due process than for takings purposes).

The distinction is based, at least in part, on the fact that while the word "property" is used in both clauses, "the word appears in the midst of different phrases with somewhat different objectives, thereby permitting differences in the way in which the term is interpreted." *E. Enters.*, 524 U.S. at 557 (Breyer, J.,

dissenting).[9] The Due Process Clause uses the term "deprived" while the Takings Clause is only invoked if property is "taken." "Deprived" encompasses but is broader than "taken." Thus, due process was historically designed to cover, among other things, general liabilities – most notably monetary deprivations through "fines." Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. at 984. The Takings Clause, in contrast, was designed to address appropriations of discrete assets, which by their nature can be "taken." *Ibid.*[10]

Consistent with this differential treatment of property, monetary payments – including taxes – are not subject to Takings Clause review (see pp. 20–22, *supra*), but they are subject to review under the Due Process Clause. See *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36 (1990)

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[9] During our Nation's early years, Chief Justice Marshall similarly explained:

> The same words [in the Constitution] have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by the context. This is undoubtedly true. In common language the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context.

Cherokee Nation v. Georgia, 30 U.S. 1, 19 (1831) (interpreting the word "foreign").

[10] The Takings Clause also refers to "private" property, while the Due Process Clause does not include that limiting adjective, possibly reflecting the intent to have due process cover a broader range of interests.

(tax exaction is a deprivation of property under the Due Process Clause).[11]

Moreover, using substantive due process principles to review permit conditions requiring monetary payments reflects the different nature of that clause. Its inquiry into whether government action is so arbitrary as to offend due process accommodates judicial analysis of whether a monetary payment condition mitigates a development's impacts, that is, a review of the condition's legitimacy. *Lingle*, 544 U.S. at 542. Takings principles, in contrast, focus on whether the government is taking property without providing just compensation. As Justice Kennedy explained in *Eastern Enterprises*, "[g]iven that the constitutionality of the [monetary imposition] appears to turn on the legitimacy of [the imposition], rather than on the availability of compensation, . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." 524 U.S. at 545 (Kennedy, J. concurring in judgment and dissenting in opinion) (internal citation and quotation marks omitted).

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[11] Persons can also challenge taxes and other monetary payment requirements under the Equal Protection Clause. As this Court explained in *Hillsborough Township v. Cromwell*, 326 U.S. 620, 623 (1946),

> [t]he equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.

Thus, while courts should not use the Takings Clause to review land use decisions conditioning approvals on monetary payments, courts can review those conditions under the Due Process Clause.

CONCLUSION

This Court should not extend *Nollan* and *Dolan* beyond adjudicative land use decisions conditioning development approvals on dedications of an interest in real or personal property to public use.

Respectfully submitted,

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DECEMBER 2012

AMICUS CURIAE BRIEF

No. 11-1447

In the Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF FORMER MEMBERS OF THE NATIONAL RESEARCH COUNCIL COMMITTEE ON MITIGATING WETLAND LOSSES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

In accordance with United States Supreme Court Rule 37, we respectfully submit this brief with the parties' consent as *amici curiae* in support of Respondent, St. Johns River Water Management District.[1]

Amici are distinguished wetland scientists, academics, and professionals who are former members of the National Research Council (NRC) Committee on Mitigating Wetland Losses. As NRC Committee members, they evaluated the ability of practitioners to restore lost wetland functions, reviewing scientific literature, federal and state wetland mitigation policies, and on-the-ground mitigation projects. Their 2001 NRC report, "Compensating for Wetland Losses under the Clean Water Act," concluded that the widely accepted policy goal of "no net loss" of wetlands was not being achieved. The report recommended policy reforms to ensure that permit conditions reflect a tight nexus between wetland functions lost as the result of permitted activity and wetland functions gained through compensatory mitigation projects. Some of the report's recommendations formed the basis for a 2008 federal compensatory mitigation regulation.

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[1] Pursuant to United States Supreme Court Rule 37.6, this brief was not authored in whole or in part by counsel for a party, and no counsel or a party, other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

This brief describes the specific context of wetland permitting in which this case arose, and outlines the substantial scientific and policy rationale for wetland mitigation requirements.

The attached appendix contains brief biographies of the *amici curiae*.

SUMMARY OF ARGUMENT

Through their chemical, physical, and biological functions, wetlands provide essential ecosystem services to people, businesses, and communities. These ecosystem services, such as improving water quality, providing flood control and coastal storm mitigation, supporting fish, shellfish, avian, and other wildlife populations, and sequestering climate-harming carbon, yield significant economic value. Conversely, the destruction and degradation of wetlands trigger a cumulative loss of wetland functions and services. Consequently, federal and state agencies, including those in Florida, have adopted the objective of "no net loss" of wetland function.

When a proposed regulated activity will adversely affect wetlands, federal and state agencies typically follow an "avoid-minimize-compensate" approach. As an initial matter, impacts to wetlands are to be avoided. If impacts cannot be entirely avoided (because of, for example, the size or type of project), then the impacts should be minimized to the extent practicable. Any remaining impacts should then be eliminated or offset through

compensatory mitigation projects: restoration, enhancement, creation, and/or preservation of other wetlands.

Compensatory mitigation projects, which are required through permit conditions, should result in "no net loss" of wetland function. In practice, however, the National Research Council (NRC) Committee on Mitigating Wetland Losses and studies both before and since 2001 found that we are not achieving "no net loss" of wetland function. In light of on-going permitted and unpermitted wetland losses, and the adverse environmental, public safety, and economic impacts of those losses, it is critical that mitigation efforts ensure effective replacement of lost wetland functions.

One acre of wetland is not necessarily equivalent to another acre of wetland. The ecosystem services provided by a particular wetland depend on, among other things, its location within a watershed and its hydrology. Accordingly, the NRC Committee recommended that the accounting of wetland functional loss (through permitted activities) and wetland functional gain (through mitigation projects) should be done in a watershed context. An accurate measurement of this functional loss and gain requires the use of an assessment methodology. Federal and state agencies have collaborated to develop rapid assessment methodologies that are applied to the impact site and the mitigation site to determine what functions will be lost and what functions will be gained—if the mitigation project meets its performance standards.

The NRC Committee and subsequent studies found that compensatory mitigation projects often failed to meet their performance standards. Even when a project met its performance standards, it did not necessarily provide the same functions at the same level as reference wetlands of the same type. Therefore, to account for the risk of mitigation failure and the temporal loss of wetland functions, mitigation at greater than a ratio of 1:1 is often needed to fully compensate for wetland impacts.

The NRC Committee recognized that restoration of destroyed or degraded wetlands is the preferred technique for replacing lost wetland functions. Moreover, the Committee observed that off-site mitigation within the watershed often can be more effective than on-site mitigation in replacing wetland functions lost as the result of the permitted activity. Finally, the Committee recognized that simply preserving existing wetlands, in and of itself, does not replace lost wetland functions. Permitting 3.4 acres of wetlands to be filled on the condition that eleven other existing acres be preserved, as was proposed in this case, still results in a net loss of 3.4 acres—as well as the loss of the ecosystem goods and services that the area provided.

Federal and state water resource permitting standards require that wetland mitigation permit conditions—including conditions requiring off-site mitigation and greater than 1:1 wetland acre replacement ratios—be reasonably related to the impacts of the permitted development. Federal compensatory mitigation policy dictates that the

amount of mitigation required must be "*roughly proportional* with the permitted impacts, so that it is *sufficient to offset those lost aquatic resource functions*." Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,633 (Apr. 10, 2008) (emphasis added). Florida's compensatory mitigation policies follow suit.

In short, the sound scientific and legal framework that bounds mitigation conditions requires a reasonable relationship between wetland functions lost due to permitted activity and wetland functions to be gained through wetland mitigation permit conditions. This required nexus between wetland functions lost and gained is essential to achieving "no net loss" of wetland functions and services.

ARGUMENT

I. Fully Replacing Lost Wetland Functions is a Central Tenet of Modern Water Law.

A. Wetlands perform chemical, physical, and biological functions essential to watershed integrity and provide services essential to community well-being.

Wetlands are complex ecosystems that, depending on their type and on circumstances within a watershed, can improve water quality, provide natural flood control, diminish droughts, recharge groundwater aquifers, and stabilize shorelines. They

often support a wide variety of plants and animals, including rare and endangered species, migratory birds, and the young of commercially valuable fishes. Their beauty and diversity contribute to their recreational value.[2] The public interest in conserving wetland functions and services as a public good is well-established both scientifically and economically.

Wetlands serve a number of ecological functions, most notably those related to water quality, hydrology, habitat, and carbon sequestration.[3] Some of these ecological functions provide human benefits, or "ecosystem services,"[4] such as storing flood waters, pollutants, and sediment that would otherwise flow downstream.[5]

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[2] Nat'l Research Council, *Compensating for Wetland Losses Under the Clean Water Act* 1 (Nat'l Acad. Press 2001) [hereinafter NRC, *Wetland Mitigation Report*].

[3] *Id.* at 27; *see also* Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Wetlands and Water Synthesis* 1–3, tbl.1, 34–38 (World Res. Inst. 2005) [hereinafter Millennium Ecosystem Assessment, *Wetlands*].

[4] The physical, chemical, and biological processes that occur in wetlands and other aquatic resources are referred to as "functions," while the benefits that human populations receive from these aquatic resource functions are often referred to as "services" or "ecosystem services." *See* 33 C.F.R. § 332.2 (2012) (providing the 2008 Corps and EPA compensatory mitigation regulation definitions); *see also* Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,604.

[5] *See e.g.*, NRC, *Wetland Mitigation Report*, *supra* note 2, at 27–30; Millennium Ecosystem Assessment, *Wetlands*, *supra* note 3, at 1–3, tbl.1, 34, 36–37; Virginia Carter, *Wetland Hydrology, Water Quality, and Associated Functions*, *in* National Water Summary on Wetland Resources 35, 43–46 (Judy D. Fretwell et al. eds., U.S. Dep't of Interior & U.S. Geological Survey, USGS Water-Supply Paper 2425, 1996), *available at*

Wetlands often store waters that later contribute to stream flow during low-flow periods.[6] They store and filter surface water and recharge shallow groundwater aquifers, providing a critical supply of fresh water for human use.[7] Wetlands also provide important spawning, nesting, feeding, refuge, and other habitat requirements for fish, migratory birds, other wildlife, and the invertebrates, amphibians, and other organisms on which fish and wildlife depend for survival and reproduction.[8]

The ecosystem services of intact wetlands also have significant economic value. And the total

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http://water.usgs.gov/nwsum/WSP2425/hydrology.html; W. Aaron Jenkins et al., *Valuing Ecosystem Services from Wetlands Restoration in the Mississippi Alluvial Valley*, 69 Ecological Econ. 1051, 1055–56 (2010); William J. Mitsch & James G. Gosselink, *The Value of Wetlands: Importance of Scale and Landscape Setting*, 35 Ecological Econ. 25, 28 (2000); Curtis J. Richardson, *Ecological Functions and Human Values in Wetlands: A Framework for Assessing Forestry Impacts*, 14 Wetlands 1, 3 (1994); Dennis F. Whigham & Thomas E. Jordan, *Isolated Wetlands and Water Quality*, 23 Wetlands 541, 542–44 (2003).

[6] Millennium Ecosystem Assessment, *Wetlands*, *supra* note 3, at 1–3, tbl.1, 36–38; William J. Mitsch & James G. Gosselink, *Wetlands* 347 (4th ed., John Wiley & Sons, Inc. 2007); Thomas C. Winter et al., *Ground Water and Surface Water: A Single Resource*, U.S. Geological Survey Circular 1139, at 67 (1998), *available at* http://pubs.usgs.gov/circ/circ1139/pdf/circ1139.pdf.

[7] *See e.g.*, NRC, *Wetland Mitigation Report*, *supra* note 2, at 1; Millennium Ecosystem Assessment, *Wetlands*, *supra* note 3, at 1–3, tbl.1, 30–32; Carter, *supra* note 5, at 44.

[8] *See e.g.*, NRC, *Wetland Mitigation Report*, *supra* note 2, at 27, 51–53; Millennium Ecosystem Assessment, *Wetlands*, *supra* note 3, at 1–3, tbl.1, 30–32; Paul H. Zedler, *Vernal Pools and the Concept of Isolated Wetlands*, 23 Wetlands 597, 599–604 (2003).

economic value of unconverted wetlands is often greater than converted wetlands.[9] For example, a single acre of wetland can store 1 to 1.5 million gallons of flood water,[10] and just a 1% loss of a watershed's wetlands can substantially increase peak flow and flood volume in the watershed.[11] The Great Midwest Flood of 1993 caused an estimated $21 billion in flood damages.[12] The extensive loss of Mississippi Basin wetlands was an important factor in the severity of that flood.[13] Floodplain flood storage services have significant economic value[14] and are estimated to be worth over $50,000 per acre.[15] Wetland water filtration services can save

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[9] Millennium Ecosystem Assessment, *Wetlands*, *supra* note 3, at 2–3, tbl.1, 34–35, Box 3.1 (noting as an example that intact Canadian freshwater marshes valued at $5,800/hectare for hunting, angling, and trapping benefits compared to $2,400/hectare for marshes drained for agriculture).

[10] EPA, Functions and Values of Wetlands, EPA 843-F-01-002c (Sept. 2001), *available at* http://water.epa.gov/type/wetlands/upload/2006_08_11_wetlands_fun_val.pdf.

[11] Misganaw Demissie & Abdul Khan, *Influence of Wetlands on Streamflow in Illinois*, Illinois State Water Survey Contract Report 561, at vi, 44–45 (Oct. 1993).

[12] Neal Lott & Tom Ross, *Tracking and Evaluating U.S. Billion Dollar Weather Disasters, 1980–2005* (Nat'l Oceanic & Atmospheric Admin. Nat'l Climatic Data Ctr. 2006), *available at* http://www1.ncdc.noaa.gov/pub/data/papers/200686ams1.2nlfree.pdf.

[13] Millennium Ecosystem Assessment, *Wetlands*, *supra* note 3, at 47–48.

[14] *Id.* at 2–3, tbl.1, 36–37, Box 3.2.

[15] Nat'l Research Council, *Valuing Ecosystem Services: Towards Better Environmental Decision-Making* 170 (2005).

communities millions of dollars that would otherwise have to be spent for water treatment.[16]

Estuarine and coastal wetlands in particular play essential roles in the lifecycles of 75% of fish and shellfish commercially harvested and up to 90% of fish recreationally caught in the United States.[17] In 2009, commercial fishermen in the United States harvested 7.9 billion pounds of finfish and shellfish, earning $3.9 billion for their catch.[18] The American Sportfishing Association reports that anglers generated nearly $125 billion in total economic activity in 2006.[19] Florida touts itself as the official "Fishing Capital of the World"[20] and enjoys a $65 billion annual tourism industry "inextricably linked

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[16] John C. Austin et al., *Healthy Waters, Strong Economy: The Benefits of Restoring the Great Lakes Ecosystem* 8 (Brookings Inst. 2007) (estimating that Great Lakes clean up and restoration would reduce water treatment costs by $50–125 million).

[17] EPA, Economic Benefits of Wetlands, EPA 843-F-06-004 (May 2006), *available at* http://water.epa.gov/type/wetlands/outreach/upload/EconomicBenefits.pdf.

[18] Nat'l Oceanic & Atmospheric Admin., National Overview: U.S. Summary 5 (2009), *available at* http://www.st.nmfs.noaa.gov/st5/publication/econ/2009/US_ALL_Econ.pdf.

[19] Southwick Assocs., *Sportfishing in America: An Economic Engine and Conservation Powerhouse* 5 (Am. Sportfishing Ass'n 2007), *available at* http://asafishing.org/uploads/Sportfishing_in_America_Jan_2008_Revised.pdf.

[20] Fla. Fish & Wildlife Conservation Comm'n, *Why Florida is the Fishing Capital of the World*, http://www.visitflorida.com/fishing/articles/why-florida-is-the-fishing-capital-of-the-world (last updated July 17, 2012).

to the utilization and enjoyment of our state's natural resources."[21] Hunting and fishing alone contributed $8 billion to the Florida economy in 2006 and supported over 85,000 jobs.[22] This robust sport hunting and fishing industry "requires healthy freshwater, forest, and marine ecosystems to sustain the state's fisheries and wildlife populations."[23]

B. "No net loss" of wetland function is a widely accepted objective guiding the issuance and conditioning of state and federal water permits.

In 1989, President George H.W. Bush announced a national policy goal of "no net loss" of wetlands,[24] a policy goal that had previously been endorsed by stakeholders from federal, state, and local government and the development and conservation communities.[25] "No net loss" of wetland functions and services soon became the explicit guide

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[21] The Nature Conservancy, *Economic Benefits of Land Conservation: A Case for Florida Forever* 4 (2009), *available at* http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/florida/howwework/economic_benefits_of_land_conservation-2.pdf.

[22] *Id.* at 24.

[23] *Id.*

[24] NRC, *Wetland Mitigation Report*, *supra* note 2, at 2.

[25] *See* Conservation Found., *Protecting America's Wetlands: An Action Agenda: The Final Report of the National Wetlands Policy Forum* 1–3 (1988) (Forum members, including governors, state and local legislators, industry leaders, academics, and conservation leaders studied and adopted the no overall net loss of wetlands goal.).

for Clean Water Act mitigation policies of the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA):

> The Clean Water Act and the [CWA Section 404(b)(1)] Guidelines set forth a goal of restoring and maintaining existing aquatic resources. The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions. In focusing the goal on no overall net loss to wetlands only, EPA and Army have explicitly recognized the special significance of the nation's wetlands resources.[26]

The agencies recognized that "no net loss" of wetland functions may not be achieved in "each and every permit action," but the agencies affirmed that "it remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base."[27] The agencies' 1990 mitigation policy

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[26] Memorandum of Agreement between the Dep't of the Army & the Envtl. Prot. Agency Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines § IIB (Feb. 6, 1990) [hereinafter 1990 Mitigation MOA], *available at* http://water.epa.gov/lawsregs/guidance/wetlands/mitigate.cfm.

[27] *Id.* § IIIB; *see also* Corps Regulatory Guidance Letter (RGL) 02-02 (2002) (stating that "all [Corps] Districts will strive to

specifically provided that "for wetlands, such mitigation should provide, *at a minimum*, one for one functional replacement (i.e., no net loss of values), *with an adequate margin of safety* to reflect the expected degree of success associated with the mitigation plan."[28] The "no net loss" policy goal continues to guide federal wetland mitigation policy, as the Corps and EPA reaffirmed, after notice-and-comment rulemaking, in their 2008 compensatory mitigation regulation. 33 C.F.R. § 332; 40 C.F.R. § 230.[29]

Florida likewise has adopted a "no net loss" of wetland functions goal and compensatory mitigation permitting policies to meet that goal. Florida rules direct the state's Department of Environmental Protection (DEP) and water management districts to:

> protect, preserve and restore the quality, quantity, and environmental values of surface and ground water resources; to prevent existing

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achieve [the "no net loss"] goal on a cumulative basis, and the Corps will achieve the goal programmatically").

[28] 1990 Mitigation MOA, *supra* note 26, at § IIIB (emphasis added).

[29] *See also* Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,594 (noting that "compensatory mitigation is a critical tool in helping the federal government to meet the longstanding national goal of "no net loss" of wetland acreage and function"); *id.* at 19,604 ("The agencies have a long-standing policy of achieving no overall net loss for wetland acreage and function. Simply requiring one-to-one acreage replacement may not adequately compensate for the aquatic resource functions and services lost.").

> environmental, water quantity, and water quality problems from becoming worse; to reduce existing flooding problems; improve existing water quality; promote and protect the availability of sufficient water for all existing and future reasonable-beneficial uses and natural systems, and preserve or restore natural systems.[30]

Florida's environmental statutes dictate that the DEP and the governing board of a water management district "*shall* take into account cumulative impacts on water resources [including wetlands], and manage those resources in a manner to ensure their sustainability." *See* Fla. Stat. §§ 373.016(2) (emphasis added), 373.019(27) (2012) (defining "wetlands"). The statutes further require that "[t]he mitigation must offset the adverse effects caused by the regulated activity." *See id.* § 373.414(1)(b).[31] In order to achieve "no net loss,"

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[30] Fla. Admin. Code r. 62-40.425(1)–(2) (2005); *see also* Fla. Stat. §§ 163.3177, 187.201(9)(a) ("Florida shall protect and acquire unique natural habitats and ecological systems, such as wetlands . . . and restore degraded natural systems to a functional condition.").

[31] *See also* Fla. Admin. Code r. 62-345.100(2) (2005) ("[T]he methodology in this chapter provides a standardized procedure for assessing the functions provided by wetlands and other surface waters, the amount that those functions are reduced by a proposed impact, and the amount of mitigation necessary to offset that loss."); *id.* at r. 40C-4.091 (2010) (incorporating by reference St. Johns River Water Mgmt. Dist., *Applicant's Handbook: Management and Storage of Surface Waters*); St.

Florida's compensatory mitigation policies require accounting for the time lag between the immediate impacts of a proposed activity and the eventual replacement of ecological value, as well as the risk that mitigation will fail to fully achieve its intended benefits. *See* Fla. Admin. Code r. 62-345.600 (2001).

While the "no net loss" goal is widely accepted, it is far from being met in practice. This conclusion was a serious concern and a principal finding of the NRC Committee in 2001,[32] and it is reinforced by recent studies of wetland status and trends.[33]

Johns River Water Mgmt. Dist., *Applicant's Handbook: Management and Storage of Surface Waters* § 12.1, *available at* http://www.sjrwmd.com/handbooks/pdfs/msswhdbk.pdf [hereinafter St. Johns River Water Mgmt. Dist., *Applicant's Handbook*] ("It is the intent of the Governing Board that the criteria in subsections 12.2 through 12.3.8 be implemented in a manner which achieves a programmatic goal, and a project permitting goal, of no net loss in wetland or other surface water functions."); Fla. Stat. §§ 373.4144(1)(d), (2) (The Legislature intends to facilitate coordination between state and federal water permitting programs and intends state permits to be "at least as protective of the environment and natural resources as existing state law under this part and federal law under the Clean Water Act and the Rivers and Harbors Act of 1899.").

[32] NRC, *Wetland Mitigation Report*, *supra* note 2, at 2–3, 16–20, 120–22; *see also* R. Eugene Turner, Ann M. Redmond & Joy B. Zedler, *Count It by Acre or Function—Mitigation Adds Up to Net Loss of Wetlands*, 23 Nat'l Wetlands Newsl. 5, 15 (Nov.–Dec. 2001).

[33] *See* Thomas E. Dahl, *Status and Trends of Wetlands in the Conterminous United States 1998 to 2004*, at 16 (U.S. Fish & Wildlife Serv. 2006) (noting that acreage gains in "open ponds" probably do not represent gains in wetland function comparable to those of a vegetated freshwater wetland); Thomas E. Dahl, *Status and Trends of Wetlands in the Conterminous United*

Florida, perhaps more than most states, has struggled to come close to achieving "no net loss" of wetland function.[34] In light of on-going permitted and unpermitted wetland losses, effective replacement of lost wetland functions through compensatory mitigation continues to play a critical role in the attempt to achieve "no net loss" of wetland functions and services.

C. "No net loss" of wetland function is achieved through avoiding, minimizing, and compensating for wetland impacts.

Florida, like many other states, employs wetland mitigation standards and practices that are

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States 2004 to 2009, at 16 (U.S. Fish & Wildlife Serv. 2011) (stating that "the estimated wetland loss rate increased 140 percent [between 2004 and 2009] and, as a consequence, national wetland losses have outdistanced gains"); Susan Marie Stedman & Thomas E. Dahl, *Coastal Wetlands of the Eastern United States: 1998-2004 Status and Trends*, 40 Nat'l Wetlands Newsl. 18, 19–20 (July–Aug. 2008) (finding "an average annual net loss of about 59,000 acres [of coastal wetlands] over the 6-year period of this study").

[34] Fla. Dep't of Envtl. Regulation (FDER), *Operational and Compliance Audit of Mitigation in the Wetland Resource Regulation Permitting Process*, Report no. AR-249 (Nov. 1, 1991); FDER, *Report of the Effectiveness of Permitted Mitigation* (Mar. 5, 1991) [hereinafter FDER, *Effectiveness Report*]; *see* Kelly Chinners Reiss et al., *An Evaluation of the Effectiveness of Mitigation Banking in Florida: Ecological Success and Compliance with Permit Criteria* ix–xiii, 1–2 (Fla. Dep't of Envtl. Prot. & Univ. of Fla. 2007), *available at* http://www.dep.state.fl.us/water/wetlands/docs/mitigation/Final_Report.pdf.

based on federal implementation of the Clean Water Act. In 1972, Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," including its wetlands. 33 U.S.C. § 1251(a) (2012). Congress required EPA, working with States and Tribes, to adopt state-specific water quality standards, permitting standards, and permitting programs that would limit point source discharges of dredged and fill material and other pollutants. *See id.* §§ 1311–1319, 1341–1344. Section 404 of the Clean Water Act allows the Corps, or delegated States under an approved program, to prohibit or permit the discharge of dredged or fill material into waters and to attach conditions to those permits. *Id.* §§ 1344 (b)(1), 1343(c)(1); 40 C.F.R. § 230. Clean Water Act Section 404 permits must be issued in accordance with Guidelines established by EPA. 33 U.S.C. § 1344(b)(1); 40 C.F.R. § 230.

In order to maintain natural aquatic ecosystem function in accordance with the Act and the "no net loss" goal, the Section 404(b)(1) Guidelines emphasize the outright avoidance of adverse impacts on wetlands and other waters, requiring a "sequential mitigation" approach to permitting. Permit applicants and the Corps must first avoid impacts, then minimize impacts that cannot be avoided, and only after those two steps compensate for those impacts that can be neither avoided nor minimized. 40 C.F.R. §§ 230.10(a), (d).[35]

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[35] *See also* 33 C.F.R. §§ 320.4(a), (b), (l), (r) (Corps permitting regulations require consideration of the public interest in

"[A]ppropriate and practicable" steps must be taken that will minimize or mitigate the potential unavoidable adverse impacts of the discharge on the aquatic ecosystem. *Id.* § 230.10(d).

The agencies' 2008 compensatory mitigation regulation reiterates that compliance with the Guidelines' impact avoidance and minimization requirements must be met before compensatory mitigation plans can be approved and a Section 404 individual permit issued. *See* 33 C.F.R. §§ 332.1(c)(2), (f)(2); 40 C.F.R. §§ 230.91(c)(2), (f)(2); Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,596, 19,619–20. The agencies define compensatory mitigation as "the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved." 33 C.F.R. § 332.2; 40 C.F.R. § 230.92 (providing definitions).

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maintaining the ecological and hydrological functions of wetlands, including food chain production, nesting, spawning, rearing and resting habitat for fish and wildlife; storm and flood water storage; ground water discharge and recharge that replenishes water supplies; and water purification. The regulations also direct the avoidance, minimization, and mitigation of individual and cumulative adverse impacts to these functions.); 1990 Mitigation MOA, *supra* note 26, at § IIC.

Many states, including Florida, employ their own wetland mitigation standards and practices based on Clean Water Act Section 401 or 404 authority and/or independent state water laws. As with federal mitigation, these state mitigation provisions often establish a "no net loss" goal, emphasize impact avoidance and minimization, and include mitigation ratio requirements and wetland site and kind preferences.[36] Florida requires

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[36] *See* Fla. Stat. § 373.414(1)(a).

> In determining whether an activity . . . is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance . . . [w]hether the activity will adversely affect conservation of fish and wildlife, including endangered or threatened species, or their habitats; . . . adversely affect . . . the flow of water or cause harmful erosion . . . ; . . . adversely affect . . . fishing or . . . marine productivity . . . ; . . . will be of a temporary or permanent nature; . . . and . . . current condition and relative value of functions . . . performed by areas affected by the proposed activity.

Id.

> If the applicant is unable to otherwise meet the criteria . . . , the governing board or the department . . . , shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects . . . . Such measures may include . . . onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks . . . . The mitigation must offset the adverse effects caused by the regulated activity.

Id. § 373.414(1)(b); *see* U.S. EPA, *Core Elements of an Effective State and Tribal Wetlands Program*,

comprehensive planning that "[d]irects future land uses that are incompatible with the protection and conservation of wetlands and wetland functions away from wetlands . . . . Where incompatible land uses are allowed to occur, mitigation shall be considered as one means to compensate for loss of wetlands functions." Fla. Stat. § 163.3177.

II. A Sound Scientific and Legal Framework Requires that Mitigation Conditions Replace Wetland Functional Losses in a Watershed Context.

A. Wetland functional loss and gain are most accurately accounted for in a watershed context.

Another principal finding of the NRC Committee was that wetland functions, and thus planning and implementing wetland mitigation, must be understood within a watershed context.[37] A watershed is a land area that drains to a common waterway, such as a stream, lake, estuary, wetland, or ultimately the ocean. 33 C.F.R. § 332.2; 40 C.F.R. § 230.92 (providing definitions). How a given wetland functions and what services it provides will often depend upon its setting within the watershed.[38] For example, a particular wetland site's potential for water quality improvement is

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http://water.epa.gov/grants_funding/wetlands/cef_full.cfm#reg (last updated Apr. 17, 2012); Envtl. Law Inst., *State Wetland Program Evaluation: Phase I*, at 5, 12–13 (Jan. 2005).

[37] NRC, *Wetland Mitigation Report*, *supra* note 2, at 46–59.

[38] *Id.*

determined largely by the quality and quantity of inflowing water from the upstream portion of the watershed. The timing and volume of water flowing in from upstream also determines the wetland's flood abatement potential, both at the wetland site and downstream.[39]

Biodiversity and habitat services depend in part on "the number, type, size, and connectivity of other wetlands and open spaces in the entire watershed and the position of the site in the watershed."[40] In addition, a wetland mitigation site's functions will often depend on the extent of urban or agricultural development nearby and in the watershed.[41] Careful placement of mitigation wetlands within the landscape to ensure appropriate hydrological conditions is necessary for wetland sustainability and for replacement of wetland functions.[42]

In light of these considerations, the NRC Committee concluded that a watershed approach would improve permit decision-making, and specifically recommended as follows:

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[39] Royal C. Gardner et al., *Compensating for Wetland Losses under the Clean Water Act (Redux): Evaluating the Federal Compensatory Mitigation Regulation*, 38 Stetson L. Rev. 213, 221 (2009); NRC, *Wetland Mitigation Report*, *supra* note 2, at 48–49.

[40] Gardner et al., *supra* note 39, at 221 (citing Joy B. Zedler, *Wetlands at Your Service: Reducing Impacts of Agriculture at the Watershed Scale*, 1 Frontiers in Ecology & Env. 65, 69 (Mar. 2003)).

[41] *Id.* at 221–22.

[42] NRC, *Wetland Mitigation Report*, *supra* note 2, at 4.

> Site selection for wetland conservation and mitigation should be conducted on a watershed scale in order to maintain wetland diversity, connectivity, and appropriate proportions of upland and wetland systems needed to enhance the long-term stability of the wetland and riparian systems.[43]
>
> Individual compensatory mitigation sites should be designed and constructed to maximize the likelihood that they will make an ongoing ecological contribution to the watershed; this contribution should be specified in advance.[44]

These conclusions have been implemented at the federal level. Following the NRC Committee's recommendations, the Corps now "must use a watershed approach to establish compensatory mitigation requirements in DA [Army Corps] permits to the extent appropriate and practicable." 33 C.F.R. § 332.3(c)(1); 40 C.F.R. § 230.93(c)(1). The Corps and EPA define this watershed approach as "an analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed." 33 C.F.R. § 332.2; 40 C.F.R. § 230.92. This process "involves consideration of watershed needs, and how locations and types of compensatory

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[43] *Id.*

[44] *Id.* at 7.

mitigation projects address those needs." 33 C.F.R. § 332.2; 40 C.F.R. § 230.92. It should include inventories of historic and existing aquatic resources, as well as identification of degraded aquatic resources and aquatic resource needs within watersheds that can be met through mitigation projects. 33 C.F.R. § 332.3(c)(2)(iv); 40 C.F.R. § 230.93(c)(2)(iv).[45]

The stated goal of the watershed approach is to "maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites." 33 C.F.R. § 332.3(c)(1); 40 C.F.R. § 230.93(c)(1); Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,598. The Corps and EPA are directed to use an appropriate watershed plan when available to guide compensatory mitigation requirements. 33 C.F.R. § 332.3(c)(1); 40 C.F.R. § 230.93(c)(1). These plans generally will be developed by governmental and/or non-profit resource planners, in consultation with relevant watershed stakeholders. 33 C.F.R. § 332.2; 40 C.F.R. § 230.92; Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,610.

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[45] For a promising illustration of the watershed approach, see The Nature Conservancy, *The Duck-Pensaukee Watershed Approach: Mapping Wetland Services, Meeting Watershed Needs*, http://www.conservationgateway.org/ConservationPractices/EcosystemServices/NaturesValues/NaturesValuesEcosystemServicesProvidedbyWetlands/TheDuck-PensaukeeWatershedApproach/Pages/duck-pensaukee-watershed-approach.aspx (last visited Dec. 13, 2012).

Florida also mandates a watershed focus in determining compensatory mitigation requirements, requiring a clear nexus between the cumulative impacts of wetland loss within the watershed and the wetland functions restored to the watershed through mitigation. Fla. Stat. §§ 373.414 (8)(a)–(b). Florida law directs its water management districts to consider "the cumulative impacts upon surface water and wetlands . . . within the same drainage basin" and declares that in-basin mitigation compensates for and potentially avoids cumulative impacts within the same basin. *Id.* § 373.414 (8)(a).

Similarly, Florida law requires the DEP and water management districts to use regional watersheds to guide the establishment of mitigation bank service areas. *Id.* § 373.4136(6)(b). Mitigation banks, which are a type of off-site mitigation, "shall be consistent with . . . watershed management objectives" and regional ecological benefits. Fla. Admin. Code r. 62-342.100 (2001). The Florida Administrative Code requires that mitigation banks "improve ecological conditions of the regional watershed" and provide viable and sustainable ecological and hydrological functions. *Id.* at r. 62-342.400(1)(a). When mitigation is performed outside the regional watershed, the mitigation credit requirement is set higher to account for the related loss of ecological function within the watershed.[46]

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[46] *See* Fla. Stat. § 373.4135(1)(d) ("A Mitigation Service Area may be larger than the regional watershed if the Mitigation Bank provides exceptional ecological value such that adverse impacts to wetlands outside the regional watershed could reasonably be expected to be adequately offset . . . because of

The regional water management districts in Florida are tasked with determining mitigation requirements specific to particular watersheds.[47]

B. Scientifically sound functional assessment methodologies measure the permitted loss and necessary replacement of wetland function.

Federal compensatory mitigation policy dictates that the amount of mitigation required must be "*roughly proportional* with the permitted impacts, so that it is *sufficient to offset those lost aquatic resource functions.*" Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,633 (emphasis added). Both the NRC report[48] and the 2008 compensatory mitigation regulation highlight the importance of using "appropriate functional or condition assessment methods or other suitable metrics," where available, to measure how much

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local ecological or hydrological conditions."); Fla. Admin. Code r. 62-342.600(2), (6) (2007).

[47] *See* Fla. Admin. Code r. 40C-41.011 (2006) (incorporating by reference St. Johns River Water Mgmt. Dist., *Applicant's Handbook*, and providing for watershed-specific mitigation considerations); St. Johns River Water Mgmt. Dist., *Applicant's Handbook*, *supra* note 31, at § 11.4.4 (For the Econlockhatchee River Hydrologic Basin, "[off-site land preservation as] [m]itigation . . . must offset . . . adverse impacts of the system to the functions provided by the Econlockhatchee River Riparian Habitat Protection Zone and wetlands outside this zone, to aquatic and wetland dependent species. The lands proposed for preservation must be regionally significant or provide unique fish and wildlife habitat.").

[48] NRC, *Wetland Mitigation Report*, *supra* note 2, at 7.

compensatory mitigation is required. 33 C.F.R. § 332.3(f)(1); 40 C.F.R. § 230.93(f)(1). Functional assessments typically provide quantitative measures of the specific functions performed by an impact site and the functions expected to be provided by the compensatory mitigation site. Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,634.

Wetland functional assessment methodologies have been evolving since the 1980s and continue to evolve, with regional guide books tailored to regional wetland subclasses.[49] Federal and state resource managers work together to develop state and regional rapid assessment methodologies that strive to be both scientifically sound and efficient to apply in the permitting context.[50]

Florida law directs the DEP and water management districts responsible for implementation of the environmental resource permitting program to develop a uniform mitigation assessment methodology (UMAM) for wetlands and other surface waters.[51] The methodology must: (1)

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[49] *Id.* at 131–37.

[50] *See* Fla. Stat. § 373.414(18)(a) ("In developing the uniform mitigation assessment method, the department shall seek input from the United States Army Corps of Engineers in order to promote consistency in the mitigation assessment methods used by the state and federal permitting programs."); *see also* Kelly Chinners Reiss et al., *supra* note 34, at 1 (citation omitted) (detailing the integration of state and federal permitting for mitigation banks in Florida).

[51] In 2000, the Legislature directed the DEP and regional water management districts to develop a uniform wetland mitigation

require the application of "reasonable scientific judgment;" (2) determine the "value of functions provided by wetlands and other surface waters" considering current site conditions, utilization by fish and wildlife, location, uniqueness, hydrologic connection, and factors specifically applicable to mitigation banks; (3) account for the expected time-lag associated with offsetting impacts and the degree of risk associated with the proposed mitigation; and (4) account for different ecological communities in different areas of the state. Fla. Stat. § 373.414(18); *see also* Fla. Admin. Code r. 62-345.100 (2005) (requiring uniform assessment methodology to determine mitigation credits).

Florida's uniform mitigation assessment method is "a standardized procedure for assessing the functions provided by wetlands and other surface waters, the amount that those functions are reduced by a proposed impact, and the amount of mitigation necessary to offset that loss." Fla. Admin. Code r. 62-345.100(2) (2005). Florida DEP and the water management districts must use the UMAM, applying "reasonable scientific judgment," to "quantify the acreage of mitigation, or the number of credits from a mitigation bank or regional offsite mitigation area, required to offset the impact." *Id.*;

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assessment method (UMAM). Statutory text required that upon departmental adoption of the method by rule, the method would be binding on all governmental agencies as "the sole means to determine the amount of mitigation needed to offset adverse impacts . . . and to award and deduct mitigation bank credits." Fla. Stat. § 373.414(18) (2000); Fla. Stat. § 373.414(18) (2012).

see also id. at r. 62-345.300 (2007) (providing further guidance in applying the UMAM).

C. Proper mitigation-to-wetlands loss ratios are also necessary to achieve "no net loss" of wetland function.

To fully replace lost wetland functions, mitigation requirements must account for a variety of factors. Such factors include: the type of mitigation (*e.g.*, preservation); the risk of mitigation failure; differences between the functions lost at the impact site and the functions expected to be generated through mitigation (meaning the ecological functions must be of a similar type, *e.g.*, shallow wetland functions for shallow wetland functions); the temporal losses of wetland function; the difficulty of restoring or establishing the desired resource type and functions; and/or the distance between the impacted resource and the compensation site. 33 C.F.R. § 332.3(f); Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,601–02, 19,610, 19,613, 19,633–34.[52] Where available, appropriate functional assessment methods are increasingly used to determine the total amount of mitigation in light of such considerations. 33 C.F.R. § 332.3(f)(1); 40 C.F.R. § 230.93(f)(1); *see also* Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,601, 19,634.[53] However, when such

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[52] *See also* NRC, *Wetland Mitigation Report*, *supra* note 2, at 108–10.

[53] *Id.* at 7, 155.

methods are not available or appropriate, the federal mitigation rule requires a minimum 1:1 acreage or linear foot compensation ratio, with a greater than 1:1 ratio required where necessary to account for these variables. 33 C.F.R. §§ 332.3(f)(1)–(2). The federal compensatory mitigation regulation requires that the rationale for the replacement ratio be documented in the administrative record for the permit action. *Id.* § 332.3(f)(2); Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,613.

Prior to the adoption of UMAM in 2004, Florida law authorized the use of "ratios of mitigation-to-wetlands loss" and required that they be based on "the quality of the wetland to be impacted and the type of mitigation proposed."[54] However, once adopted, the Florida legislature directed that UMAM would then, with only limited exceptions, "supersede all rules, ordinances, and variance procedures from ordinances that determine the amount of mitigation needed to offset such

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[54] Fla. Stat. § 373.414; *see, e.g.*, *id.* § 403.9332(1)(a) (requiring a 2:1 mitigation ratio to replace impacts to mangrove trees); *id.* § 373.414(6)(d)(2) (For mitigation activities for limerock and sand mining, "the ratio . . . shall be based on the quality of the wetland to be impacted and the type of mitigation proposed."); *see also* Fla. Admin. Code r. 40C-4.091 (2010) (incorporating by reference St. Johns River Water Mgmt. Dist., *Applicant's Handbook*); St. Johns River Water Mgmt. Dist., *Applicant's Handbook*, *supra* note 31, at §§ 12.3.2–12.3.2.2 (providing guidelines on ratios for acreage of mitigation required compared to acreage impacted by regulated activities for certain specific types of mitigation, including creation, restoration, enhancement and preservation).

impacts" and would be "the sole means to determine the amount of mitigation needed to offset adverse impacts to wetlands and other surface waters and to award and deduct mitigation bank credits." Fla. Stat. § 373.414(18).

Where compensation ratios are used, higher ratios are required for simple preservation of existing wetlands because "the main purpose of preservation is to prevent a future loss of resources, not to provide a gain." Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,624; *see also id.* at 19,613, 19,660. Prior to adoption of UMAM, Florida authorized preservation mitigation through conveyance of a conservation easement and with the limitation that preservation mitigation "will not be granted [at] a ratio lower than 10:1."[55]

Greater than 1:1 mitigation ratios are also warranted to account for temporal loss—the time lag between the immediate loss of aquatic functions caused by the permitted impacts and the gradual replacement of aquatic functions at the mitigation site. As the NRC Committee noted, "[u]nless the replacement wetlands functions are in place before

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[55] *See* Memorandum from FDER Secretary Dale Twachtmann to FDER Permitting Division Director Randy Armstrong, *Policy for "Wetlands Preservation-as-Mitigation"* (June 20, 1988); St. Johns River Water Mgmt. Dist., *Applicant's Handbook, supra* note 31, at § 12.3.2.2(c) ("[T]he ratio guideline for preservation of wetlands and other surface waters is substantially higher than for restoration and creation. The ratio guideline for wetland and other surface water preservation will be 10:1 to 60:1 (acreage wetlands and other surface waters preserved to acreage impacted).").

the permitted impacts occur, there will be some temporal loss of wetland function in the watershed until the replacement wetland is functioning at the same level that the impact site had been."[56] Temporal loss must be considered in determining mitigation ratios, particularly for mitigation not initiated until after permitted impacts and for impacts to resources like forested wetlands with long development times. 33 C.F.R. § 332.2; Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,625, 19,638. Florida law also requires consideration of this temporal loss,[57] and the UMAM incorporates temporal loss into the assessment formula. Fla. Admin. Code r. 62-345.600(1) (2007); *see also id.* at r. 62-345.300(3)(d).

D. Wetland restoration is most likely to replace lost wetland function, but wetland preservation is not.

Of the four basic compensatory mitigation options, restoring wetlands is most likely to replace lost wetland functions. "Restoration" refers to the manipulation of the hydrology, soils, and/or vegetation of a site to return the natural/historic functions to a former or degraded aquatic resource. *See* 33 C.F.R. § 332.2; 40 C.F.R. § 230.92. It may involve, for example, restoring the natural hydrology to wetlands that have been diked or ditched and

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[56] NRC, *Wetland Mitigation Report*, *supra* note 2, at 155.
[57] Fla. Stat. § 373.414(18).

drained.[58] At the federal level, restoration is consistently recognized as the first option because the likelihood of success is greater than with other forms of compensatory mitigation:

> Restoration should generally be the first option considered because the likelihood of success is greater and the impacts to potentially ecologically important uplands are reduced compared to establishment, and the potential gains in terms of aquatic resource functions are greater, compared to enhancement and preservation.[59]

Florida law also states a clear preference for restoration, emphasizing "the restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems rather than alteration of landscapes to create wetlands. This is best accomplished through restoration of ecological communities that were historically present." Fla. Stat. § 373.4135(1).

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[58] *See e.g.*, NRC, *Wetland Mitigation Report*, *supra* note 2, at 36; Royal C. Gardner, *Mitigation*, *in* Wetlands Law and Policy 253, 258 (Kim Diana Connolly et al. eds., 2005).

[59] 33 C.F.R. § 332.3(a)(2); 40 C.F.R. § 230.93(a)(2); *see also* Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,632; 1990 Mitigation MOA, *supra* note 26, at § II.C.3; NRC, *Wetland Mitigation Report*, *supra* note 2, at 5, 125–26 ("Whenever possible, choose wetland restoration over creation."); FDER, *Effectiveness Report*, *supra* note 34.

In contrast to restoration, "[p]reservation does not result in a gain of aquatic resource area or functions." 33 C.F.R. § 332.2; 40 C.F.R. § 230.92. Preservation involves "the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources." 33 C.F.R. § 332.2; 40 C.F.R. § 230.92. It does not involve alteration of the site.[60] Preservation may avoid or minimize permitted wetland loss, but by definition it does not *replace* permitted wetland losses that do occur. Preservation is disfavored as compensatory mitigation because it perpetuates a net loss of wetland functions, unless it is used in conjunction with wetland restoration, enhancement, or creation.[61] Florida's UMAM specifically requires downward adjustment of the calculation of the gain in ecological value that results from preservation as compared to restoration. Fla. Admin. Code r. 62-345.300(3)(a), (c) (2007).

E. Scientifically supported off-site mitigation can often replace more wetland function in the watershed than on-site mitigation.

Hydrology, land use, and other locational factors around a project site often limit the on-site capacity for replacing certain lost wetland functions, particularly fish and wildlife habitat functions.[62]

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[60] NRC, *Wetland Mitigation Report*, *supra* note 2, at 13–14.

[61] *Id.*

[62] *See* 33 C.F.R. § 332.3(c)(2)(ii); 40 C.F.R. § 230.93(c)(2)(ii); Compensatory Mitigation for Losses of Aquatic Resources, 73

Fundamentally, "[p]roper placement within the landscape of compensatory wetlands to establish hydrological equivalence is necessary for wetland sustainability."[63] The Corps and EPA mitigation standards highlight these constraints, noting there are circumstances in which "on-site mitigation is neither practicable nor environmentally preferable."[64]

It follows that to effectively replace lost wetland functions, a general preference for on-site mitigation "should not be automatic, but should follow from an analytically based assessment of the wetland needs in the watershed and the potential for the compensatory mitigation to persist over time."[65] The federal compensatory mitigation regulation adopts this watershed approach, finding that both on-site and off-site mitigation should be rigorously assessed and what may often be warranted is a combination of on-site mitigation measures to

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Fed. Reg. at 19,601, 19,604; NRC, *Wetland Mitigation Report*, *supra* note 2, at 4.

[63] NRC, *Wetland Mitigation Report*, *supra* note 2, at 4, 144.

[64] Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,601; *see also* 1990 Mitigation MOA, *supra* note 26, at § II.C.3; RGL 02-02, *supra* note 26, at 5; Fla. Stat. § 373.4135(1) ("Mitigation banks and offsite regional mitigation can enhance the certainty of mitigation and provide ecological value due to the improved likelihood of environmental success associated with their proper construction, maintenance, and management."); Fla. Admin. Code r. 62-342.100 (2001) (discussing mitigation banks).

[65] NRC, *Wetland Mitigation Report*, *supra* note 2, at 4; Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,629.

address water quality and quantity functions, and off-site mitigation to compensate for lost habitat functions. Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,601, 19,604; 33 C.F.R. §§ 332.3(c)(2), (d)(2); 40 C.F.R. §§ 230.93(c)(2), (d)(2).

Florida law has specifically provided for off-site mitigation within the watershed dating back to 1993. Fla. Stat. § 373.414(8)(a) (1993). Based on the state's considerable experience with wetland mitigation, Florida Statute § 373.4135 even more clearly provides for off-site mitigation through regional off-site mitigation areas and through mitigation banks, recognizing that they "can enhance the certainty of mitigation and provide ecological value due to the improved likelihood of environmental success associated with their proper construction, maintenance, and management." Fla. Stat. § 373.4135(1) (2012); *see also id.* § 373.4136 (mitigation banks); *id.* §§ 373.403(19), (22). The Florida Legislature explicitly directed the DEP and the water management districts "to participate in and encourage the establishment of private and public mitigation banks and offsite regional mitigation," *id.* § 373.4135(1), and to consider these forms of mitigation as "a permittable mitigation option" in accordance with their permitting rules. *Id.* § 373.4135(1)(c). Florida law also authorizes the DEP and the water management districts to "allow the use of a mitigation bank or offsite regional mitigation alone or in combination with other forms of mitigation to offset adverse impacts of activities regulated under this part." *Id.* § 373.4135(e).

III. The Sound Scientific and Legal Framework that Bounds Mitigation Conditions Requires a Reasonable Relationship and Rough Proportionality Between Wetland Functions Lost to Development and Those Gained Through Permit Conditions.

Federal and state water resource permitting standards already require that wetland mitigation permit conditions—including conditions requiring off-site mitigation and greater than 1:1 wetland acre replacement ratios—be reasonably related and roughly proportional to the impacts of the permitted development. These standards require that agency permitting decisions avoid, minimize, and replace permitted losses of wetland function in order to protect the public's interest in clean drinking water; flood protection; access to swimming, boating, hunting, fishing, and other outdoor recreation and associated economic benefits; and other public goods and services.

As detailed above, wetland functional loss and gain are most accurately accounted for when explicitly assessed, planned, and implemented in a watershed context. Scientifically sound functional assessment methodologies measure the permitted loss and necessary replacement of wetland function. Whether or not functional assessment methodologies are available, mitigation ratios are often required to account for the quality and type of mitigation, the risk of mitigation failure, and the temporal losses of wetland function. Restoring wetlands is more likely

to replace lost wetland functions than establishing wetlands on an upland site. Preserving existing wetlands without wetland restoration is disfavored, and functional assessment calculations of a preserved area are discounted because it does not replace lost wetland functions. Often, strategically planned off-site mitigation within the watershed can be more effective than on-site mitigation in replacing wetland functions lost as the result of the permitted activity.

The 2001 NRC Report included recommendations specifically aimed at ensuring that federal and state mitigation permit conditions translate into actual replacement of wetland functions lost due to permitted activity in the watershed.[66] Federal compensatory mitigation policy dictates that the amount of mitigation required must be "*roughly proportional* with the permitted impacts, so that it is *sufficient to offset those lost aquatic resource functions.*" Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,633 (emphasis added). The Corps and EPA's mitigation regulations explicitly require this reasonable relationship and rough proportionality in mitigation permitting.[67]

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[66] NRC, *Wetland Mitigation Report*, *supra* note 2, at 4–7.

[67] Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,633; *see also id.* at 19,634 (stating that the "functional assessments typically provide quantitative measures of specific functions performed by an impact site, and expected functions to be provided by the compensatory mitigation project site" and "[w]here quantitative measures are used, there needs to be flexibility to ensure that the required compensatory mitigation is roughly proportional to the permitted impacts").

The Florida legislature is equally clear in requiring this nexus:

> [T]he governing board . . . in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects . . . [including] onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136. It shall be the responsibility of the applicant to choose the form of mitigation. *The mitigation must offset the adverse effects caused by the regulated activity.*[68]

Florida law allows "offsite regional mitigation" only "*where an applicant proposes to mitigate the adverse impacts of only the applicant's specific activity as a requirement of the permit*, which provides regional ecological value . . . ." Fla. Stat. § 373.403(22) (emphasis added). Florida allows monetary donations as mitigation "only where the donation is specified for use in a duly noticed environmental creation, preservation, enhancement, or restoration project, endorsed by the department or the governing board of the water management district, *which offsets the impacts of the activity permitted under this part.*" *Id.* § 373.414(1)(b) (emphasis added).

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[68] Fla. Stat. § 373.414(1)(b) (emphasis added); *see also id.* §§ 373.414(8)(a)–(b).

Further, both federal and state law provide administrative and judicial forums for a permittee to contest mitigation permit conditions that he or she believes lack the requisite nexus and proportionality between wetland functions lost from the permitted activity and those gained through the required mitigation. A Corps permit applicant can challenge permit conditions through the Corps administrative appeal process. 33 C.F.R. §§ 320.1(a)(2), 331. Having exhausted that administrative remedy, the applicant can challenge the Corps final permit decision in federal district court pursuant to the Administrative Procedure Act. *Id.* §§ 320.1(a)(2), 331.12; *see* 5 U.S.C. § 704.

Florida's Administrative Procedure Act (APA) likewise provides a prospective permittee with an administrative forum in which to dispute compensatory mitigation requirements. *See generally* Fla. Stat. § 120. The Florida APA imposes procedural requirements on both the Florida DEP and the regional water management districts. *See id.* §§ 120.52, 120.57. A permittee may file a petition or request a hearing with the agency. *Id.* § 120.569(2)(a). An administrative proceeding provides for similar discovery as a judicial proceeding, including witness testimony under oath, subpoena power, and the imposition of most sanctions afforded under state law. *Id.* § 120.569(2)(f). Additionally, the APA provides for judicial review of final agency action. *Id.* § 120.68.

The sound scientific and legal framework that bounds mitigation conditions requires a reasonable

relation and "rough proportionality" between wetland functions lost due to permitted activity and wetland functions to be gained in the watershed through compensatory mitigation.

CONCLUSION

The effective replacement of lost wetland functions through compensatory mitigation, including off-site wetland mitigation, is an essential, well-accepted, and science-based element of effective water resources policy in the United States. *Amici curiae* respectfully request that the Court affirm the decision of the Supreme Court of Florida.

Respectfully submitted,

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APPENDIX

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Royal C. Gardner is Professor of Law and Director of the Institute for Biodiversity Law and Policy at Stetson University. Since 2006, he has served on the Scientific and Technical Review Panel of the Ramsar Convention on Wetlands. A member of the editorial board of *Wetlands Ecology and Management*, he was the recipient of the 2006 National Wetlands Award for Education and Outreach.

Dr. Whit Gibbons is Professor Emeritus of Ecology at the University of Georgia's Savannah River Ecology Laboratory where he has conducted research on wetland ecology for four decades. He has published more than 200 scientific articles and authored over 20 books on fish, amphibians, and reptiles associated with aquatic systems. He has served on several NRC Life Sciences review panels.

Dr. Carol A. Johnston is Professor of Natural Resource Management at South Dakota State University and a former member of the NRC's Water Science and Technology Board. She served on panels of the NRC studying wetland mitigation, wetland identification and classification, and watershed management. In 2009, she received the National Wetlands Award for Science Research from the Environmental Law Institute.

Dr. William J. Mitsch is Eminent Scholar and Director of Everglades Wetland Research Park at Florida Gulf Coast University. He was founder and director for 20 years of the Ramsar-designated Olentangy River Wetland Research Park at The Ohio State University. His research and teaching focus on wetland and aquatic ecology, wetland creation and restoration, and ecosystem modeling, and he has published over 300 papers and edited or written 17 books including the standard wetland textbook *Wetlands*. A past president of the Society of Wetland Scientists, he received the Theodore M. Sperry Award in 2005 for a career in ecosystem restoration from the Society for Ecological Research. In 2004, he was a recipient of the Stockholm Water Prize from King Carl XVI Gustaf of Sweden.

Dr. Karen L. Prestegaard is Associate Professor, Department of Geology, at the University of Maryland. Her research focuses on rivers, watersheds, and wetlands, particularly interactions among geomorphology, hydrology, and biogeochemical processes in coastal and riparian wetlands. She has served on NRC panels that have

examined wetland mitigation, water use, stream flow information, and nuclear waste repositories. She is a fellow of the Geological Society of America.

Ann Redmond, CEP, is a Managing Scientist with Brown and Caldwell and an authority on environmental regulation spanning the areas of watershed-scale regulatory and planning solutions, all aspects of wetland mitigation, cumulative impacts, and habitat and ecosystem services assessments, and restoration planning frameworks. She has experience in compensatory mitigation issues from her 11 years as Florida DEP's expert on mitigation and mitigation banking, leading the statewide development, training, and implementation of policy, rules, and legislation in these areas, and following with positions as a mitigation provider and a consultant.

Charles Simenstad, Research Professor at the University of Washington's School of Aquatic and Fishery Sciences, is a Fellow of the American Association for the Advancement of Science, associate editor of three scientific journals, and recipient of the 2009 NOAA-AFS Nancy Foster Award for Habitat Conservation. He has authored or co-authored around 60 peer-reviewed scientific papers, 19 book and proceedings chapters, approximately 30 miscellaneous publications, and over 120 workshop proceedings and technical reports on estuarine and coastal ecology and restoration science.

Dr. R. Eugene Turner is a Chaired Professor, Distinguished Research Master, and Distinguished Faculty at Louisiana State University. He is a recipient of the 1998 National Wetland Award for Research, the 1999 Blasker Award for Science and Engineering with Nancy Rabalais, and the 2012 INTECOL Wetlands Lifetime Achievement Award. He is Chair of the INTECOL Wetlands Working Group, serves on numerous national and international scientific committees, and is active in scientific matters concerning scientific aspects of coastal environmental management, especially hypoxia, wetland restoration, and the impacts of the BP Macondo oil spill.

AMICUS CURIAE BRIEF

No. 11-1447

In the

Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

ON WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

BRIEF AMICUS CURIAE OF HILLCREST PROPERTY, LLP IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Hillcrest Property, LLP (Hillcrest) respectfully submits this amicus brief in support of the Petitioner, Coy A. Koontz, Jr.[1]

Hillcrest owns property in Pasco County, Florida, a suburb of Tampa. Hillcrest has endured blatant, extortionate leveraging of the police power in connection with securing development approval for a commercial shopping center. The County conditioned its approval of Hillcrest's proposed shopping center upon Hillcrest dedicating to the County, at no cost to the County, 4.23 acres (or 28%) of its commercially zoned property.[2] The County required the dedication pursuant to a legislatively-adopted local ordinance that mandated such dedication: (1) without payment of compensation for the land taken or damages to the remaining untaken land; (2) without regard to the traffic impact of Hillcrest's proposed development; and (3) without the County first being required to make an individualized determination that the

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[1] Pursuant to Rule 37.2, all parties have consented to the filing of this brief and have received notice of amicus curiae's intent to file this brief. Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or part. Other than amicus curiae, its agents, and its counsel, no person made a monetary contribution to fund the preparation or submission of this brief.

[2] *Hillcrest Prop., LLP v. Pasco Cnty.*, Hillcrest's Motion for Summary Judgment [MSJ], Case No. 8:10-CV-819-T-23TBM (M.D. Fla. 2012) (Doc. 112 at 11). All parenthetical citations in this brief are to this docket, e.g. ((Doc. __ at __).

required dedication was related in both nature and extent to the traffic impact of Hillcrest's proposed development.

That a local government feels free to enact and enforce an ordinance that flies in the face of this Court's exactions jurisprudence underscores the need for this Court to reign in local government exaction practices.

SUMMARY OF ARGUMENT

Although a government may regulate the ownership of property under its police power, this Court has found it necessary to develop outer limits so that the power does not swallow property rights. This Court developed exactions law to protect property owners from a government's extortionate leveraging of the police power to obtain benefits for which the government would otherwise have to pay for. The unconstitutional conditions doctrine provides this protection through both the Takings Clause and the Due Process Clause.

The Florida Supreme Court ignored this doctrine, which underlies this Court's exactions jurisprudence—even though the lower appellate court extensively discussed it. *See St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220 (Fla. 2011) [*Koontz V*]; *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8 (Fla. 5th DCA 2009) [*Koontz IV*]). Instead, with little critical analysis, the Florida Supreme Court took a simplistic flawed view of exactions that led the court to conclude that the need for government regulatory "authority and flexibility" trumps the protections of the Fifth Amendment. It

held that Mr. Koontz could only challenge an unconstitutional condition related to a land use permit if he first gave in to it, and even then that only an illegitimate demand for real property could be challenged.

In response, this Court should hold that: (1) a government is liable when it refuses to issue a land use permit because the landowner refuses to accede to a permit condition that would have violated the test set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. Tigard*, 512 U.S. 374 (1994); and (2) the protections of *Nollan* and *Dolan* apply to all types of governmental demands that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.

Because local government exaction practices have become so widespread, Hillcrest respectfully suggests that this Court should take this opportunity to clearly and comprehensively address the constitutional limitations governing exactions and the remedies available to landowners faced with extortionate leveraging of the police power. Experience since *Nollan* and *Dolan* strongly suggests that such guidance is necessary to ensure that government compliance with the Fifth Amendment is "more than an exercise in cleverness and imagination." *Nollan*, 483 U.S. at 841.

ARGUMENT

I. Exaction Law Protects The Property Owner From Being Required By Government To Contribute More Than His Or Her Fair Share Of The Costs Of Eliminating Or Reducing Public Burdens

Over 400 years ago, Sir Edward Coke, Chief Justice of the Court of Common Pleas, invalidated a general gross tax upon a town by the King's commissioners for necessary drainage and sewer repairs. *The Case of the Isle of Ely*, Mich. 7 Jac. 1 (1609). In doing so, he applied the "basic natural and common law principle that no person should be required to contribute more than his or her fair share toward eliminating or reducing public burdens." B. H. Seigan, *Economic Liberties and the Constitution* (2d ed. 2006).

This principle is enshrined in the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation, and is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893); *see also Norwood v. Baker*, 172 U.S. 269, 279 (1898) ("In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public

use without compensation.").

This Court has applied the principle to land use exactions [3] as a special application of the "unconstitutional conditions" doctrine. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005); *Dolan*, 512 U.S. at 385; *see also Nollan*, 483 U.S. at 837. In the exactions context, this doctrine prohibits the government from requiring that a person give up the constitutional right to receive compensation when property is taken for a public use in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property taken. [4] This limit is necessary

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[3] Exactions are "land-use decisions conditioning approval of development on the dedication of property to public use." *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). Exactions mitigate adverse impacts the development may have on the surrounding area and shift the burden of providing public facilities from the government to the developer. V. Been, *"Exit" As a Constraint on Land Use Exactions: Rethinking The Unconstitutional Conditions Doctrine*, 91 Colum. L. Rev. 473, 482-83 (1991).

[4] Generally, the unconstitutional conditions doctrine forbids the government from imposing, in exchange for a discretionary benefit, any conditions that "are repugnant to the constitution and laws of the United States." *Barron v. Burnside*, 121 U.S. 186, 200 (1887). It indicates that the means by which valid ends are achieved matter: "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result." *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 598-99 (1926); *see* M. Merrill, *Unconstitutional Conditions*, 77 U. Penn. L. Rev. 880, 889 (1929) (Doctrine serves as "a barrier against subversive attacked by the government, state or federal, upon the privileges vouchsafed by the Constitution.").

because, as this Court has observed, "the natural tendency of human nature is to extend the [police power] more and more until at last private property disappears." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Land use exaction practices are particularly susceptible to this tendency because they promote the use of government monopoly power to extract or extort illegitimate or unreasonable concessions from developers and landowners, who have no real choice in the matter, in order to facilitate uncompensated takings of private property, thereby enabling government to avoid politically unpopular taxation. *Been,* 91 Colum. L. Rev at 484-506; S.A. Haskins, *Closing The Dolan Deal—Bridging The Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 491 (2006).

Because exactions present the "heightened risk that the [government's] purpose is avoidance of the compensation requirement, rather than the stated police-power objective," *Nollan*, 483 U.S. at 841, this Court requires the government to make an individualized determination that: (1) an "essential nexus" exists between the exaction and a legitimate public purpose for which the exaction is being imposed; and (2) the exaction is "roughly proportionate" in nature and extent to the impact of the proposed development. *Id.* at 837; *Dolan*, at 391. For the nexus to be "essential," the exaction must "substantially advance the same government interests that would furnish a valid ground for denial of the permit." *Lingle*, 544 U.S. at 547. For an exaction to be "roughly proportionate," no precise formula is required, but the government "must make some sort of individualized determination that the

required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391.

Nollan and *Dolan* provide the necessary check against the government's natural tendency to expand the police power and ensure "against the State's cloaking within the permit process an out-and-out plan of extortion." *Lambert v. San Francisco*, 529 U.S. 1045, 1048 (2000) (Scalia, Thomas, and Kennedy, JJ., dissenting from denial of certiorari) (citing *Nollan*, 483 U.S. at 837).

Nollan and *Dolan* both involved adjudicatory decisions requiring dedication of land as a condition of permit approval that were challenged as violating the Takings Clause. That meant this Court did not squarely address legislatively-mandated or non-dedicatory exactions, or the situation where the government elects to deny the permit because of the landowner's refusals to agree to the imposition of the exaction. These questions were left to the lower federal courts and state courts. The results have been inconsistent and conflicting, leaving the law confusing, chaotic, and uncertain. This confusion and uncertainty encourages just the sort of extortionate leveraging of the police power *Nollan* and *Dolan* were intended to prevent, while impaling property owners like Mr. Koontz on a Morton's Fork.[5] Their choice is between either unreasonable

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[5] "The expression Morton's Fork originates from a policy of tax collection devised by John Morton, Lord Chancellor of England in 1487, under the rule of Henry VII. His approach was that if a subject lived a life of luxury, then clearly he spent a lot of money and, therefore, had sufficient income to spare for the king. However, if the subject lived frugally, and did not display signs of wealth, then apparently he had substantial savings and could

delay in the permit approval process followed by years or decades of litigation, or acquiescence in an uncompensated taking—both of which may jeopardize the economic feasibility of the proposed project. *See Koontz IV*, 5 So. 3d at 12 n.4. The Florida Supreme Court's decision will only encourage such leveraging, while leaving Florida property owners without an effective remedy to combat extortionate leveraging of the police power by state and local governments.

II. The Florida Supreme Court's Decision Ignores The Purpose of the Unconstitutional Conditions Doctrine, Which Underlies *Nollan* and *Dolan*

The underlying purpose of the "essential nexus-rough proportionality" test is to ensure that government does not use the discretionary approval process to extort property having little or no relationship to the impacts of the proposed development, and by so doing, single out individual landowners to bear the burden of the government's attempt to remedy problems that they had not contributed to any more than other landowners. *Dolan*, 512 U.S. at 384. This purpose is universally applicable, regardless of the character of the government decision-making process, the type of exaction imposed, when in the development review and approval process to the extortionate demand is made, or whether the landowner resists or acquiesces

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then afford to give it to the king. These arguments were the two prongs of the fork and regardless of whether the subject was rich or poor, he did not have a favorable choice." *Ill. Cent. R. Co. v. Broussard*, 19 So. 3d 821, 827 (Miss. Ct. App. 2009).

in the extortionate demand. *See Parking Ass'n of Ga., Inc. v. Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas and O'Connor, JJ., dissenting from denial of certiorari); Haskins, 38 Urb. Lawyer at 496-500 (citing numerous cases). *Cf. San Remo Hotel v. San Francisco*, 41 P. 3d 87, 105 (Cal. 2002); *Ehrlich v. Culver City*, 911 P. 2d 429, 457 (Cal. 1996) *on remand from* 512 U.S. 1231 (1994); *with Flower Mound v. Stafford Estates, L.P.*, 135 SW. 3d 620, 641 (Tex. 2004).

As Justices Scalia, Thomas, and Kennedy have explained, "[t]here is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference." *Lambert*, 529 U.S. at 1048. The intermediate appellate court below reached the same conclusion, affirming the trial court's award of compensation for a temporary taking, and noting that, "[e]ven an attempt to exact improper concessions supports an inference that the affected property owner's land is over regulated," and that the government has gone too far. *Koontz IV*, 5 So. 3d. at 12 n.4.

The District did not challenge below the trial court's determination that the off-site mitigation violated the essential nexus and rough proportionality requirements of *Nollan* and *Dolan*. The Florida Supreme Court, however, concluded that Mr. Koontz's situation was not within the "express parameters" of *Nollan* and *Dolan* because the District demanded that Mr. Koontz spend money making offsite improvements to the District's land; not that he dedicate his own land. According to the Court, even if *Nollan* and *Dolan* applied, Mr. Koontz's

challenge would fail because the District did not issue permits, Mr. Koontz never expended any funds towards the performance of off-site mitigation, and nothing was ever taken from him. *Koontz, V*, 77 So. 3d at 1230.

These are all distinctions without constitutional difference that ignore the purpose of the unconstitutional conditions doctrine and the teachings of *Nollan*, *Dolan*, and *Lingle*. *See Smith v. Mendon*, 822 N.E.2d 1214, 1227 n.4 (N.Y. 2004) (Read, J., dissenting) (attacking majority's narrow interpretation of exactions law that refused to apply *Nollan-Dolan* test to a conservation easement exaction).

The Florida Supreme Court did not discuss the unconstitutional conditions doctrine because it concluded that this Court had not applied the doctrine in the land use exaction setting to property other than real estate. Nothing in the Fifth Amendment, or the unconstitutional conditions doctrine, or *Nollan* and *Dolan* limit the type of property protected to real estate or interests in real property. This Court has consistently interpreted the Fifth Amendment to protect a wide variety of property interests, real and personal, tangible and intangible.[6] Nor is there a principled basis for such a

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[6] "Property" under the Takings Clause comprises both tangible and intangible property. *See, e.g.*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998) (accrued interest); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (trade secrets); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980) (money); *Armstrong*, 364 U.S. at 44-46 (1960) (materialmen's liens); *Lynch v. United States*, 292 U.S. 571 (1934) (contracts); *Norwood*, 172 U.S. at 279 (money). *See also Frost*, 271 U.S. at 583 (unconstitutional conditions doctrine

limitation. Indeed, this Court has suggested that *Nollan* and *Dolan* apply to exactions of money. *See Ehrlich*, 512 U.S. 1231 (remanding in light of *Dolan*). Whether the government improperly exacts land, improvements, or money, ***property*** is confiscated-either permanently or temporarily-without payment of compensation in violation of the Fifth Amendment. To hold otherwise is the moral equivalent of criminalizing certain trespasses upon land while excusing all forms of larceny.

Furthermore, contrary to the implication of Florida Supreme Court's decision, this Court has never shackled the unconstitutional conditions doctrine to the Takings Clause, or to adjudicatory exactions requiring dedication of land. *See Nollan*, 483 U.S. at 835 n.4 (considering possibility of doctrine's use in equal protection context), 837 (analogizing doctrine's application in the exactions context to the First Amendment context); *Dolan*, 512 U.S. at 385 (citing applications of doctrine in the employment law context that, in turn, apply the doctrine to denials of public employment, tax exemptions, unemployment benefits, and welfare payments); *see also* R. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. at 11 (noting the varied uses of the doctrine).

The Florida Supreme Court's conclusion that Koontz's exaction challenge failed because no permit was issued imposing the offsite mitigation requirement fails to recognize that the purpose of the

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applied to state's attempt to condition privilege of using highways for commercial transportation purposes upon private carrier's dedication of personal property to public use).

unconstitutional conditions doctrine is to prevent extortionate leveraging of the police power ***in the first instance***. Leveraging occurs, and the landowner's rights violated the moment the government seeks to impose an exaction that fails to satisfy *Nollan* or Dolan. The integrity of the doctrine's protection should not depend on whether the government is successful in forcing the landowner to accede to its extortionate demands. Otherwise, government, which has superior bargaining power in the development permitting process, will have little incentive to refrain from extortionate leveraging of its police power if it government believes it can ultimately avoid paying compensation by eventually backing down from its improper demands when and if the property refuses to acquiesce in the extortionate demand. As this Court and the intermediate appellate court below have concluded:

> One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not justify the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.

Nollan, 483 U.S. at 837 n. 5 (quoted by *Koontz IV*, So. 3d at 12 n. 4).

In the final analysis, "[a]n attempt by government to extort is no less reprehensible than *a fait* accompli." *Koontz IV*, 5 So. 3d at 12, n.4. *Id.* Indeed, it is arguably more reprehensible. At least in the case of accession to the extortionate demand that does not make the project economically unfeasible, the landowner can elect to accept the conditions, obtain development approval and seek compensation for a taking of the exacted property.

True, a landowner who refuses to acquiesce in the demand can contest the government action. *Koontz IV*, 5 So. 3d at 20. However, this remedy does not adequately address the practical realities faced by a landowner seeking to make legitimate economically beneficial use of his or her property. A landowner who challenges an extortionate demand will have to forego otherwise permittable development of his or her property until the challenge is finally resolved in the courts and will incur substantial costs and delay in the meantime. In Mr. Koontz's case, that challenge took 11 years, from the time in 1994 when he first applied for a permit, until 2005, after the offsite-mitigation condition was judicially determined to violate *Nollan* and *Dolan* and the District finally issued the permit without the condition.

The Florida Supreme Court, like the cases it relied upon, failed to critically engage with the doctrine of unconstitutional conditions.[7] By failing to

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[7] *See McClung v. Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008) (refusing to "raise the concern of judicial interference with the

ground its decision on consideration of the unconstitutional conditions doctrine, the Florida Supreme Court decision will have the effect of encouraging the very extortionate leveraging of the police power that the unconstitutional conditions doctrine is designed to prevent, while effectively denying landowners a meaningful remedy to combat such leveraging except in cases of exactions of land. Indeed, by grounding its decision on the need to preserve governments' "authority and flexibility to independently evaluate permit applications," *Koontz V*, 77 So. 3d at 1230, the Florida Supreme Court gave state and local governments a green light to attempt to use the land use permitting process to leverage illegitimate concessions from landowners, safe in the knowledge that the Florida Supreme Court considers such land use regulatory "authority and flexibility" to trump the Fifth Amendment's proscription against extortionate leverage of the police power. This Court has previously cautioned: "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

The Florida Supreme Court's decision giving exclusive significance to whether the District ultimately imposed the off-site mitigation

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exercise of local government police powers"); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1579 n.21 (10th Cir. 1995) (dismissively noting that the unconstitutional conditions doctrine limits exactions law); *Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. N. Myrtle Beach*, 548 S.E.2d 595, 602 (S.C. 2001) (no mention of doctrine, and only cursory discussion of police powers). The cases the Florida Supreme Court declined to follow, however, considered and applied the unconstitutional conditions doctrine. *See Flower Mound*, 135 S.W.3d at 639 (discussing in terms of the police power, as *Nollan* did); *Ehrlich*, 911 P.2d at 444 (1996).

requirement, and whether Mr. Koontz spent money on the off-site mitigation, also runs afoul of this Court's temporary takings precedent. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) this Court held that that compensation, even for temporary takings, was required by "the self-executing character of the [Fifth Amendment] with respect to compensation." *Id.* ("[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."). [8] In many situations, improper demands by government for land, improvements or money that are properly resisted by the landowner will result in unreasonable delay in development approval, and are, from the landowner's perspective, the practical equivalent of temporary governmental deprivation of all use of land. In this case, Mr. Koontz was deprived of economically beneficial use of his property by the District's unreasonable demands for 11 years. Delay occasioned by extortionate leveraging of the police power should not be considered a "normal delay" in the development approval process that would avoid a temporary taking claim. The Florida Supreme Court's decision cannot be squared with this precedent, which require

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[8] *See also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 339 (2002) ("[W]e do not hold that the temporary nature of a land-use restriction precludes a finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.").

payment of compensation for temporary takings even where the government eventually withdraws the regulation in question.

Justice Holmes warned, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Mahon*, 260 U.S. at 416. Extortionate leveraging of police power to obtain landowner concessions that the government would otherwise have to pay for, is just the sort of governmental "shortcut" Justice Holmes cautioned against. Hillcrest respectfully requests that this Court heed Justice Holmes admonition and hold that constitutional shortcuts such as that attempted by the District in this case do not pay off by quashing the Florida Supreme Court's decision.

III. Extortionate Leveraging Of The Police Power Government Is Not Isolated, Has Become Increasingly Widespread, And Should Be Addressed Clearly And Comprehensively By This Court Under Both The Takings And Due Process Clauses

A. The Unconstitutional Conditions Doctrine Applies To Both The Takings And Due Process Clauses

It does not follow from the Florida Supreme Court's decision that Mr. Koontz was not entitled to be compensated under the unconstitutional conditions doctrine for the "temporary" 11-year deprivation of property he suffered as a result of the District's demands. This is because, as a limitation on

the police power, the unconstitutional conditions doctrine is also grounded in due process. *See Frost* 271 U.S. at 595 (holding demand that a private carrier become public for the benefit of using roads was violation of due process); *La. Pac. Corp. v. Beazer Materials & Svcs., Inc.*, 842 F. Supp. 1243, 1254 (E.D. Cal. 1994) (considering doctrine of unconstitutional conditions in terms of due process, where government makes a demand of "your money or your life."). Not rooted in "any one substantive vision of the Constitution," it "guards against a characteristic form of government overreaching and thus serves a state-checking function." K.M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1506 (1989).[9]

Although *Nollan* and *Dolan* were decided under the Takings Clause, rather than the Due Process Clause, the relevant considerations underlying each are expressly bottomed on preventing the government from extortionately leveraging its police power to obtain concessions from a landowner that the government would otherwise have to pay for itself. *W. Linn Corp. Park, L.L.C. v. W. Linn*, 240 P.3d 29, 41 (2010) (interpreting *Lingle* as not restricting *Nollan* and *Dolan* to the takings clause). *Lingle* highlighted the uniqueness of the exactions analysis, and explained that the "essential nexus" test, when compared to the traditional "substantially advances" due process test, seeks to determine whether the exaction advanced the ***same*** interest that would be served by the permit's denial. This suggests that the

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[9] The doctrine is especially applicable to land use problems, where the police power has significant breadth. R. Epstein, 102 Harv. L. Rev. at 61.

"essential nexus" test requires a stricter or heightened form of judicial scrutiny when testing an exaction under both the Due Process and Takings Clauses. This conclusion is entirely consistent with this Court's holdings that the police power rationales deemed adequate to sustain government regulation under the Due Process Clause are coextensive with those deemed sufficient to satisfy the public purposes requirement of the Takings Clause. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) citing *Berman v. Parker*, 348 U.S. 26 (1954). It is also consistent with the unconstitutional conditions doctrine, which "trigger[s] a demand for an especially strong justification by the state." Sullivan, 102 Harv. L. Rev. at 1419.

Other courts have held that extortionate leveraging of the police power in the land use context is a violation of due process. *See Roma Constr. Co. v. aRusso*, 96 F.3d 566, 574-76 (1st Cir. 1996) (municipal policy, custom and practice of extorting outsiders, businessmen and developers, if proven, constitutes violation of due process actionable under 42 U.S.C. § 1983); *Hillside Prods., Inc. v. City of Macomb*, 2008 WL 268888, *3-4 (E.D. Mich. 2008) (where record provided a sufficient basis from which jury could find that government unreasonably withheld its consent and revenues under contract and extortionately attempted to force party to negotiate from position of weakness, Plaintiff had a colorable claim for violation of substantive due process).

Nollan is therefore best viewed as holding that the unconstitutional conditions doctrine requires heightened judicial scrutiny under both the Takings and Due Process clauses in order to ensure that the

government is not cloaking within its permit process an outright plan of extortion. *Id.* at 547. And indeed the trial court below invalidated the District's denial of Koontz permit application on Due Process grounds as "an unreasonable exercise of the police power," and then awarded damages for a temporary taking for the 11-year period that Koontz was deprived of use of his land. Pet. Cert App. D-11, App. C-1.

B. Hillcrest's Experience With Pasco County's Legislatively-Enacted Outright Plan Of Extortion

As members of this Court have recognized, the problem of extortionate government demands are "more than a local and isolated phenomenon." *Lambert*, 529 U.S. at 1048. The lengths to which local government will go to exact concessions from landowners that it would otherwise have to pay for is exemplified by the Ordinance applied to Hillcrest by Pasco County.

Known as the Right-of-Way Corridor Preservation Ordinance, the Ordinance's express intent is to "provide for the dedication and/or acquisition of right-of-way and transportation corridors. § 319.1(B), Pasco County, Florida Land Development Code [LDC] (Doc. 39 at 45). The purpose of establishing the corridors is to save future right-of-way acquisition costs. [10] County officials candidly acknowledge that the Ordinance "saves the County millions of dollars each year in right of way acquisition costs, business damages and severance

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[10] *See* MSJ (Doc. 112-3 at 15-16).

damages."[11] The corridor widths have little if any relationship to projected future traffic volumes and were not based on the particular traffic impact of any particular proposed development at any particular location in the County at or over any particular time period.[12] Instead, the County staff estimated the future number of lanes and corresponding right-of-way widths required for the future roadway network needed to maintain the adopted roadway level-of-service upon complete build-out of the County in 2050.[13]

The Ordinance requires any landowner seeking development plan approval of a development site lying wholly or partially within a corridors to depict the lands lying within a corridor on their development plans as a clear zone, free of permanent structures. The Ordinance further requires the landowner to dedicate such lands to the County, at no cost to the County, as a condition of development approval. §§ 319.3.A, 319.6, 319.8.A, LDC (Doc. 39 at 46, 52).[14] The lands required to be dedicated under

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[11] *See* MSJ (Doc. 112-2 at 3).

[12] *See* MSJ (Doc 112-3 at 11-12, 15-17, 22-28).

[13] *See* MSJ (Doc. 112-3 at 13, 19-21).

[14] Use of the areas set aside and dedicated is precluded or severely restricted to temporary, non-structural "interim" uses. Interim uses are conditioned upon the landowner's written agreement to: (i) make adequate upfront provision for the future relocation of the use on the remainder property; (ii) obtain a right-of-way use permit from the County; (iii) cease the use and demolish the improvements at his or her expense upon the County's demand; and (iv) waive the right to be compensated for such improvements and for the cost of their demolition. The written agreement must be recorded. §§ 319.6.A-F, LDC (Doc. 39

the Ordinance include: (1) the lands within the corridors located on the development site; (2) additional lands located nearby or contiguous to the development site that are within corridors and are owned by the same person or entity that owns the development site but that are not sought to be developed; (3) additional lands for new arterial and collector roadways for which corridors have not been previously adopted but which the County requires as a condition of development plan approval; and (4) additional lands for the drainage/retention, wetland mitigation, floodplain compensation, frontage roads, sidewalks, bike paths and other roadway related improvements associated with the roadway improvements for which right-of-way is required to be dedicated. The dedication must be made before the approved development may commence. § 319.8.A, LDC (Doc. 39 at 52-53).

The right-of-way is exacted without the County having first made an individualized determination that the land required to be dedicated is reasonably related both in nature and extent to the traffic impact of the proposed development. § 319.8, LDC (Doc. 39 at 52-53). Indeed, dedication is required regardless of: (1) the magnitude or traffic impact of the proposed development; (2) the level of traffic congestion on the adjacent road network; (3) the lack of present need to widen the road; (4) whether widening of the road is required to accommodate the traffic impacts of the proposed development; (5) whether the road is scheduled for widening; (6) whether the roadway is ever even built; and (7) whether adequate capacity

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at 49-52).

exists on the roadway to accommodate the proposed development.

The Ordinance purports to cure its obvious constitutional infirmity by providing that landowners, who believe that such dedication is not "roughly proportionate" to the traffic impacts of his or her proposed development, and who wish to be compensated for any such excessive dedication requirement, that ability to pursue a discretionary "dedication waiver" procedure before the same administrative tribunals that impose the dedication requirement in the first place. § 319.9 LDC (Doc. 39 at 53-58). The dedication waiver process is time-consuming, [15] costly, [16] onerous, [17] unfair in numerous respects, [18] and unlikely to result in

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[15] The landowner is potentially subject to multiple costly, time-consuming administrative hearings before the Development Review Committee (DRC) and the County's Board of County Commissioners (BCC).

[16] The dedication waiver remedy requires landowners to prepare and file, at their own expense, an application that includes costly real estate appraisals and traffic studies. The estimated costs ranged exceeds $85,000. (Doc. 104 at 6).

[17] Resort to the dedication waiver remedy before development plan approval results in substantial delay in such approval. Resort to this remedy after development plan approval prevents the landowner from proceeding with further development and subjects the previously approved development plan to re-review and possible revocation or modification. §§ 319.9.A, 319.9.F.1-2, LDC (Doc. 39 at 53-54, 57-58).

[18] The BCC and the DRC retain the ultimate, unbridled discretion to approve or deny such relief without payment of full or just compensation, even where the County determines that the set aside or dedication is excessive. §§ 319.9.C-E, LDC (Doc.

meaningful compensation.[19] Its remedial protections

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39 at 56-57). The methodology prescribed under the Ordinance for determining whether and the extent to which "compensation" should be awarded: (1) applies different, more onerous transportation exaction assessment standards to individuals whose property lies within a corridor as compared to similarly situated persons whose property does not lie within such corridor; and (2) requires that the value of any excess set aside or dedication be determined without regard to legislatively and judicially mandated principles of "full" or "just" compensation.

In arriving at the excess dedication amount for which a landowner may be "compensated," section 319.9: (1) excludes from consideration the value of the property based on the development approval sought or obtained, § 319.9.C, LDC (Doc. 39 at 56); (2) requires that the property be valued based on the Property Appraiser's most recent valuation for ad valorem tax purposes without regard to the development approval sought or obtained, §§ 319.9.B.2-3, LDC (Doc. 39 at 54-55) ; (3) employs the "before and after" appraisal method, § 319.9.B.2.(a)-(b), LDC (Doc. 39 at 54); (4) allows for enhancement of the "after" value (i.e., reduction in compensation) by the increase in the value of the property that is shared in common with neighboring landowners resulting from the market's knowledge of the roadway project for which the dedication was required. § 319.9.B.2.(a)-(b), LDC (Doc. 39 at 54); and (5) makes no provision for either severance damages to the remaining property or interest on any excess dedication that may have previously been made. §§ 319.9.D-E, LDC (Doc. 39 at 56-57).

[19] The "compensation" potentially awardable is capped and, at the discretion of the County, any such award can take the form of non-fungible, non-monetary benefits. "Compensation" is limited to: (1) cash payment of no more than 115% of the value of the excess land required to be dedicated as determined by the County property appraiser prior to the plan or permit/order for the property which is being dedicated, less the value of any density transfer; (2) transportation impact fee credits subject to the eligibility, timing and other requirements of the County's transportation impact fee ordinance; (3) design and construction

are illusory.[20] In short, the Ordinance's purported cure is worse than its constitutional disease. Nevertheless, the Ordinance further expressly requires exhaustion of this administrative remedy before the landowner may seek judicial relief from an excessive dedication requirement. §319.9.F.2, LDC. (Doc. 39 at 58).

Pasco County applied the Ordinance to Hillcrest to require as a condition of development plan approval that Hillcrest set aside and dedicate 4.23 acres (28%) of its commercially zoned property for the future widening of a state highway which its property. Report (Doc. 168 at 8-9).[21] Because the Ordinance mandated dedication without requiring the County to first make the individualized determination required by *Nollan* and *Dolan*, dedication was required even though the existing roadway was adequate without widening to handle the traffic projected to occur as a result of Hillcrest's proposed development. (Doc. 77-1 at 2)

As a practical matter, Hillcrest had no meaningful choice in the matter because County zoning regulations required Hillcrest to apply for

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by the County of the transportation improvements the landowner would otherwise be required to construct having a value equal to or greater than the excess dedication amount; (4) credit against any transportation mitigation or proportionate share payments required under the County's transportation concurrency management regulations; (5) or some combination of the above. § 319.9.D.1-5, LDC (Doc. 39 at 56-57).

[20] Report (Doc. 168 at 29 n. 31).

[21] This did not include lands for off-site drainage, floodplain compensation, wetland mitigation facilities associated with that future expansion, and demands by other federal, state, or local government agencies. *Id.*

development plan approval in order to preserve its commercial land use entitlements. Its plan submittal triggered the Ordinance's mandatory dedication requirement forcing Hillcrest to choose between compensation for the taking of its property and development of its property. (Doc. 105 at 2-5). Hillcrest was forced to acquiesce in the County's dedication requirement, and attempted to negotiate compensation with Pasco County for three years without success. Report (Doc. 168 at 10, 21). After negotiations broke down Hillcrest filed suit in federal court, alleging takings, due process, and equal protection claims under the United States and Florida Constitutions. Report (Doc. 168 at 2-3). The case is presently awaiting rulings on various cross-motions for summary judgment.

The County's legislatively enacted outright plan of extortion applied to Hillcrest underscores the need for clear, strict and comprehensive limits on government land use exaction practices. In that regard, the Federal Magistrate Judge William McKoun has recommended that Pasco County's ordinance be declared facially unconstitutional under federal due process because Hillcrest and others are "compelled to surrender private property without compensation as a condition of development approval or permitting" allowing the County "to leverage its police powers to extract private property without any individualized consideration of need and wholly without consideration of the matter of compensation when such works a taking. Report (Doc. 168 at 26-27). The Magistrate reasoned that because the "dedication provision is no mere regulation of land use but rather a calculated measure by the County to

avoid the burdens and costs of eminent domain and take private property without just compensation," it was "an abuse of government power by whatever label: arbitrary, capricious or oppressive." Report (Doc. 168 at 26-27).

In so ruling, the Magistrate cited the Florida Supreme Court's decision in *Joint Ventures, Inc. Florida Department of Transportation*, 563 So. 2d 622, 623 (Fla. 1990), wherein the Florida Supreme Court struck down on due process grounds a similar law purporting to authorize the Florida Department of Transportation to record maps reserving private property for future use as road right-of-way and precluding issuance of development permits within the reserved area, all in order to save right-of-way costs. The Court concluded that the statute was not an appropriate regulation under police power because, "[r]ather than supporting a "regulatory" characterization, these circumstances expose the statutory scheme as a thinly veiled attempt to "acquire" land by avoiding the legislatively mandated procedural and substantive protections of chapters 73 and 74." *Id.* at 625.[22] The Magistrate then concluded that no different result is required under federal law: "[t]he County cannot consistent with the Fifth and Fourteenth Amendments and Article X, section 6 of the Florida Constitution, employ its police powers to extort property from private landowners and avoid the obligations inherent in these constitutional

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[22] In *Tampa-Hillsborough County Expressway Authority v. A.G.W.S Corp.*, 640 So. 2d 54, 58 (Fla. 1994), the Florida Supreme Court clarified that its decision was bottomed on due process grounds).

provisions." Report (Doc. 168 at 28).

And while the Magistrate Judge concluded that *Nollan* and *Dolan* helped "inform the due process analysis," Report (Doc. 168 at 25), he rejected Hillcrest's argument that Nollan's "essential nexus" test required heightened as-applied due process scrutiny, and recommended judgment against Hillcrest on its as-applied federal due process claim. In so doing, the Magistrate accepted the arguments that *Nollan* and *Dolan* only applied to exactions challenged under the Takings Clause and that the substantive component of the Due Process Clause does not apply to adjudicative exactions requiring dedication of land as a condition of development approval. Report (Doc. 111 at 23-25; Doc. 117 at 14-16; Doc. 168 at 24-25, 30).

This conclusion appears legally incongruous for a number of reasons, and it once again underscores the need for this Court to comprehensively address the full Due Process contours of the unconstitutional conditions doctrine in the land use exaction setting. In so doing, Hillcrest suggests this Court consider the following.

First, as previously discussed, the unconstitutional conditions doctrine is not limited to a requirement that an individual give up his or her right to be compensated for any excess exaction under the Takings Clause. The doctrine protects a wide variety of constitutional rights, including substantive due process. Nor should it be limited to adjudicatory exactions. And while the cases are not all in agreement, the better reasoned cases have seen no reason to refrain from applying *Nollan* and *Dolan* to legislative acts. *See Parking Ass'n of Ga., Inc.*, 515

U.S.,at 1118; *Flower Mound*, 135 S.W.3d at 641; *Amoco Oil Co. v. Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. Ct. 1996); *see also* J.S. Burling & G. Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 399 (2009).

Second, there is no principled basis for doing so. Extortionate leveraging of the police power, regardless of ultimate purpose of the extortion, is the height of arbitrary, oppressive government and is precisely the sort of governmental conduct the Due Process Clause intended to and should protect against.

Third, the underlying purpose of the unconstitutional conditions doctrine is to prevent government from forcing individuals to give up constitutional rights in exchange for discretionary governmental benefits having little or no relationship to the benefit sought. Because the doctrine protects the constitutional rights of individuals against forced relinquishment of such rights by the government, it should not matter for due process analysis purposes whether the leveraging is accomplished legislatively or through case-by-case adjudication.

Fourth, a landowner faced with extortionate leveraging of the police power has the right to elect his or her remedies. Those remedies would be either: (1) to seek invalidation of the exaction under either the Due Process or Taking Clauses and *Nollan* and *Dolan* and compensation for a temporary taking during the time period the government insisted upon the unconstitutional exaction; or (2) to accept the propriety of the exaction, and seek compensation for the taking of the excess exacted property.

◆

CONCLUSION

This Court developed the unconstitutional conditions doctrine as a calculated and limited check on government discretion. It applied the doctrine to exactions because the realities of modern land use regulation had resulted in constant expansion of the police power. The Florida Supreme Court summarily disposed of this check on government power–going so far as to base its decision on the grounds that government needs more power, not less. Now beyond merely making adjudicative permitting decisions that occasionally cross constitutional lines, governments will brazenly legislate around the Constitution. The Pasco County ordinance that Hillcrest has endured will be a mere precursor. This Court should take this opportunity to put an end to such chicanery.

Respectfully submitted, November, 2012.

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AMICUS CURIAE BRIEF

No. 11-1447

In The Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

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INTEREST OF *AMICI CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. A central pillar of IJ's mission is to protect the rights of individuals to own and enjoy their property, both because an individual's control over his or her property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. The ability of the government to interfere with private property without adequate safeguards gravely threatens individual liberty. For this reason, IJ both litigates cases to defend the property rights of individuals and files *amicus curiae* briefs in relevant cases, including *Florida v. Harris*, No. 11-817 (U.S., argued Oct. 31, 2012); *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367 (2012); *Alvarez v. Smith*, 558 U.S. 87 (2009); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Bennis v. Michigan*, 516 U.S. 442

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[1] Counsels of record have consented to the filing of this brief. Petitioners and Respondents have filed blanket consent to all *amicus* filings with the Clerk of Court. *Amici* have given the parties timely notice of our intention to file no less than seven days prior to the party's deadline for filing its principal brief in this matter and have provided the parties with an electronic copy of this filing. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amici curiae* Institute for Justice and Cato Institute, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

(1996); *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). Additionally, IJ produces high-quality, original research on issues related to property rights.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs on a host of legal issues, including property rights.

In filing this *amicus* brief in support of Petitioner, *amici* urge this Court to extend the "essential nexus" and "rough proportionality" test established in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to non-real property exactions. Without meaningful judicial scrutiny of non-real property exactions, municipalities have engaged in widespread abuse. Adopting the rule articulated by the Florida Supreme Court – that "the *Nollan/Dolan* rule with regard to 'essential nexus' and 'rough proportionality' is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval" – will undermine private property rights by allowing abuse to continue unchecked.

All parties in this case have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

Amici file this brief to draw this Court's attention to the widespread abuse of non-real property exactions in the absence of judicial scrutiny. The "essential nexus" and "rough proportionality" tests of *Nollan* and *Dolan* require what amounts to a cause-and-effect relationship between exactions and the social problems for which they are meant to compensate. *See Pennell v. City of San Jose*, 485 U.S. 1, 20 (1987) (Scalia, J., dissenting) ("Traditional land-use regulation . . . does not violate [the principle that private property shall not be taken for public use without just compensation] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy.").

Limiting the application of *Nollan/Dolan* to exactions of real property would effectively eliminate the exactions doctrine as a check on government extortion. By drawing a distinction between real property and non-real property in this context – a distinction that is not supported by *Nollan* and *Dolan* – non-real property exactions are insulated from judicial scrutiny. Such a result undermines the cause-and-effect relationship, eliminating public officials' accountability and encouraging abuse and extortion. Indeed, in

the absence of judicial scrutiny, abuse of non-real property exactions has become widespread.

Extending *Nollan/Dolan* to non-real property exactions would not prevent local governments from imposing them. It would merely require that when the government places conditions on permit approval, the conditions make sense.

ARGUMENT

Under this Court's precedent, a government entity may only impose an exaction when the condition serves the same public purpose that would have supported a total ban of the proposed development (an "essential nexus"), *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987), and the condition is "related both in nature and extent to the impact of the proposed development" ("rough proportionality"). *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). If a court determines that the exaction lacks an essential nexus or rough proportionality, the exaction is a taking for which just compensation must be paid. *See Dolan*, 512 U.S. at 385-86.

In developing the *Nollan/Dolan* test, this Court was particularly concerned with local governments leveraging their exaction power as an "out-and-out plan of extortion" to force individuals to give up their constitutional right to compensation "in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship

to the property." *See Nollan*, 483 U.S. at 837 (citation omitted); *Dolan*, 512 U.S. at 385. That is exactly what happens in jurisdictions in which *Nollan/Dolan* has been limited to exactions of real property. In the absence of judicial scrutiny, municipalities routinely use non-real property exactions as a tool of extortion; without any meaningful limits on their power, municipal officials freely demand anything and everything – except real property – in exchange for government permits. That is why *Nollan/Dolan* must apply with equal force to both real property and non-real property exactions.

In Part I of this brief, *amici* explain that limiting *Nollan/Dolan* to real property would effectively eliminate the exactions doctrine as a check on government extortion. In Part II, we show that, in the absence of judicial scrutiny, non-real property exactions are widely abused. Finally, in Part III, we clarify that extending *Nollan/Dolan* to non-real property exactions will not eliminate governmental officials' "authority and flexibility to independently evaluate permit applications and negotiate a permit award that will benefit a landowner without causing undue harm to the community or the environment." *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011). In short, applying *Nollan/Dolan* to non-real property exactions will enable government officials to impose conditions on permit approval while preventing abuse by ensuring that those conditions make sense.

I. Limiting *Nollan/Dolan* to Real Property Exactions Would Effectively Eliminate The Exactions Doctrine as a Check on Government Extortion.

The *Nollan/Dolan* test provides an important check on the government's exaction power. In *Nollan*, landowners asked this Court to invalidate a condition placed on their development permit by the California Coastal Commission requiring them to grant a public easement across their beachfront property. 483 U.S. at 828. In holding that the condition amounted to a taking for which just compensation must be paid, this Court stated that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837 (citation omitted). In other words, in order to be valid, a condition must bear an "essential nexus" to the development restriction. *Id.*

Seven years later, in *Dolan*, a landowner asked this Court to invalidate a condition requiring her to dedicate a portion of her property to the city for use as a greenway and a pedestrian/bicycle pathway in order to obtain a permit to expand her business. 512 U.S. at 379-80. This Court found that, although the condition met the "essential nexus" test, it bore no relationship to the impact of the proposed development on the community. *See id.* at 395. In invalidating the condition, this Court held that, after determining whether an essential nexus exists between the permit

condition and the development restriction, a reviewing court must also determine whether the "degree of the exactions demanded by the city's permit conditions" is "roughly proportional" to the "projected impact of [the] . . . proposed development." *Id.* at 388. Although "[n]o precise mathematical calculation is required" to show rough proportionality, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391.

Read together, *Nollan* and *Dolan* stand for the proposition that the government may not impose extortionate permit conditions on landowners in exchange for the right to develop their property. This flows from the doctrine of unconstitutional conditions, which provides that "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan*, 512 U.S. at 385 n.11 (citation omitted). Nothing in *Nollan* or *Dolan* expressly limits their application to exactions of real property, and in practice such a limitation permits the government to exact real property without paying for it by "exact[ing] a sum of money and us[ing] that money to compensate the landowner in an eminent domain proceeding. In either case, the end result is the same: the government has taken the land from the landowner." *Garneau v. City of Seattle*, 147 F.3d 802, 819 n.5 (1998) (O'Scannlain, J., dissenting).

Limiting *Nollan/Dolan* to real property exactions would effectively eliminate the exactions doctrine as a meaningful check on government extortion. This problem is not just theoretical. Local governments have responded to the absence of judicial scrutiny for non-real property exactions by engaging in a torrent of abuse. Indeed, requiring the government to demonstrate an "essential nexus" and "rough proportionality" only in the context of real property exactions provides an easy road map to avoid judicial scrutiny: governments need only demand money or labor to avoid limitations on their exaction power. Not surprisingly, the jurisdictions that have declined to extend the *Nollan/Dolan* test to non-real property exactions have seen widespread abuses of government leverage over property owners.

II. In the Absence of Judicial Scrutiny, Non-Real Property Exactions Are Widely Abused.

Where an exaction lacks any connection to the public impact of the proposed land use, such an exaction may amount to "out-and-out . . . extortion." *Nollan*, 483 U.S. at 837 (citation omitted). This is no less true for non-real property exactions as it is for exactions of real property, yet only the latter need meet the "essential nexus" and "rough proportionality" test of *Nollan/Dolan*. In the absence of judicial scrutiny, abuse is widespread.

Below, *amici* detail some of the myriad extortionate conditions demanded of property owners in

exchange for government permits: municipalities use exactions to finance municipal pet projects; to force individuals to give up constitutional rights; to circumvent legal safeguards on private property rights; and to require individuals to perform expensive building and mitigation projects.

A. Municipalities use exactions to finance municipal pet projects.

In the absence of judicial scrutiny, municipalities use non-real property exactions to finance municipal pet projects by requiring property owners to pay enormous fees in exchange for government permits. Often called "development fees" or "impact fees," this type of non-real property exaction is widely abused.[2] "The one-time fees, imposed on builders and often folded into home prices and passed on to buyers, are used by cities to fund construction of infrastructure such as roads, sidewalks, parks and even fire stations

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[2] Some jurisdictions have extended *Nollan/Dolan* to monetary exactions. For example, in California and Arizona, monetary exactions are subject to judicial review unless they are imposed through generally applicable legislation like municipal ordinances. *See, e.g.*, *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997); *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (Cal. 1996). But although monetary exactions are reviewable in state court, the Ninth Circuit will not review them. *See Garneau*, 147 F.3d 802.

for rapidly growing neighborhoods."[3] The prevalence of impact fees has steadily increased since they first appeared in the 1950s, and can now be found in hundreds of state and city codes across the country.[4] A survey performed by Kansas State University in 2006 found that 39% of the cities surveyed imposed impact fees on new construction that year, up from 25% in 2002.[5] And a recent survey of impact fees in cities nationwide revealed that, on average, fees for a single-family home now total more than $11,000.[6]

While municipalities justify development fees to fund so-called public improvements[7] or to cover

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[3] Kris Hudson, *Rising Use of 'Impact' Fees Rankles New-Home Buyers*, Wall Street J., Nov. 21, 2007, *available at* http://online.wsj.com/article/SB119561637725500252.html.

[4] *See* State Information, ImpactFees.com, http://impactfees.com/state-local/state.php (last visited Nov. 21, 2012) (collecting websites that contain state enabling acts, procedures and requirements for impact fee statutes in 35 states).

[5] Hudson, *supra* note 3.

[6] Clancy Mullen, *National Impact Fee Survey: 2012* at app. 7 (Aug. 20, 2012), *available at* http://impactfees.com/publications%20pdf/2012_survey.pdf.

[7] For example, school board trustees in Galt, California recently approved a fee for any new residential housing construction. "Revenue from fees collected on residential development may be used to pay for construction or reconstruction of school facilities; acquisition or leasing of land for school facilities; design of school facilities; and permit and plan checking fees, among other things." Jennifer Bonnett, *Galt Elementary School District Board Increases Developer Fees*, Lodi News-Sentinel, Oct. 26, 2012, *available at* http://www.lodinews.com/news/article_0f24a173-9c96-5833-98ea-6536779b875c.html.

administrative costs associated with processing permit applications,[8] in reality they are often tools of extortion used to obtain cash for municipal pet projects or to make up for budget shortfalls. For example, city officials in Elk Grove, California needed money to finance a major road project that would turn a two-lane country road into a major four-lane thoroughfare. To raise money for the road project, Elk Grove officials passed an ordinance requiring property owners seeking development permits to pay roadway fees of a prescribed amount per linear foot of property fronting a city road.[9]

For Muhammed Ahmad and Jozette Banzon, who wanted to build a single-family home worth about $500,000 on a corner lot they owned in Elk Grove, the fee added up to nearly half the cost of the home. In exchange for the development permit, city officials demanded the couple pay $240,357 for "road improvements" around the rural property. Ahmad and Banzon were eventually able to negotiate the fee

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[8] When restaurant owner Navor Zavala wanted to add a small patio with seating to his neighborhood Mexican restaurant, local planners required him to pay a fee of $700 just to process the application. They also wanted him to install 10 parking spaces and room for bicycle parking. *SLO Builders Face Steep Fees For Minor Development*, CalCoastNews.com (Nov. 1, 2012), http://calcoastnews.com/2012/11/slo-builders-face-steep-fees-for-minor-development/.

[9] *See* Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of Pacific Legal Foundation in Support of West Linn Corporate Park, LLC at 7-8, *West Linn Corp. Park, LLC v. City of West Linn*, 132 S. Ct. 578 (2011) (No. 11-299).

down to about $10,000, but only after a public-interest law firm took their case sued the city.[10] But because that kind of development fee is not subject to *Nollan/Dolan* scrutiny in California, Elk Grove officials were free to try to extort the cost of road improvements for an entire neighborhood from one family. In the absence of judicial scrutiny, officials had no incentive to ensure that their roadway fee bore a meaningful relationship to the expected impact on the community of one couple's single-family home.

The absence of judicial scrutiny has also enabled San Francisco officials to force local hotel owners to pay for the cost of building low-income housing. San Francisco's Hotel Conversion and Demolition Ordinance requires hotel owners that want to convert so-called residential units into tourist units to obtain a conversion permit from the city, but in order to obtain the permit, hotel owners must pay to replace converted residential units, or build the units themselves. The city decides how much that will cost.

For Claude Lambert, owner of the historic Cornell Hotel, San Francisco officials decided the amount was $600,000. Mr. Lambert purchased the Cornell Hotel in 1978 after twelve years working there as a janitor.[11] After he experienced difficulty renting the

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[10] Hudson, *supra* note 3.

[11] National Center for Public Policy Research, *Hotel Must Allocate Rooms to Homeless Without Full Compensation*, CNSNews.com (July 7, 2008), http://v2cnsnews.cloud.clearpathhosting.com/news/article/hotel-must-allocate-rooms-homeless-without-full-compensation.

hotel's 24 residential units, he applied for a permit to convert them to tourist use. The city insisted that replacing those units would cost $600,000. He offered to pay $100,000, but the city refused the offer and denied the permit. *See Lambert v. City & Cnty. of San Francisco*, 67 Cal. Rptr. 2d 562, 570 (Cal. Ct. App. 1997), *cert. denied*, 529 U.S. 1045 (2000).

Mr. Lambert tried – unsuccessfully – to challenge the permit denial. He argued that the city denied the permit because he refused to succumb to the city's extortionate condition that he pay $600,000, but the California courts found that, because the city denied the permit, the condition was never actually imposed. *See Lambert*, 67 Cal. Rptr. 2d at 569 ("San Francisco did not demand anything from Lambert as a condition of a use permit. It simply denied the permit outright."). Accordingly, despite the obviously extortionate nature of the condition, it was never reviewed on the merits.[12] Requiring individuals to agree to extortionate conditions before challenging them, rather than allowing individuals to honestly object, is just

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[12] The California Court of Appeal curiously explained that "the Planning Commission might have granted the permit upon payment of $600,000[, but that] does not make its refusal to issue the permit into a taking." 67 Cal. Rptr. 2d at 1182. But this is a distinction without a difference. Indeed, "[t]here is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference." 529 U.S. 1045, 1048 (2000) (Scalia, J., dissenting).

another way courts have avoided requiring non-real property exactions to make sense.

The same was true of a similarly extortionate demand on the owners of San Francisco's San Remo Hotel, who also wanted to convert "residential" units into tourist units.[13] The owners of the hotel, brothers Tom and Robert Field, sought a permit to convert the 62 residential rooms to tourist rooms. In exchange for the permit, city officials demanded that the owners pay $567,000 to replace the converted units.[14] The owners tried to challenge the fee in court, but first the state and then federal courts held the Fields' claims barred on various procedural grounds.[15] The case was ultimately decided by this Court in 2005, but the $567,000 exaction was never reviewed on the

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[13] National Center for Public Policy Research, *Hotel Owners Must Pay off City in Order to Rent Rooms to Tourists*, CNSNews.com (July 7, 2008), http://cnsnews.cloud.clearpathhosting.com/news/article/hotel-owners-must-pay-city-order-rent-rooms-tourists.

[14] Press Release, San Remo Hotel, SF Hotel Responds to High Court Defeat in Property Rights Case (June 20, 2005), *available at* http://www.sanremohotel.com/pdf/PvB-SRop-release 05-1006.pdf.

[15] The Fields filed an action asserting facial and as-applied takings claims in state court, and subsequently in federal district court. The case wound its way up and down the state and federal court systems with various adverse findings on procedural grounds, including statute of limitations, issue preclusion, abstention, and ripeness pursuant to *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). *See San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323, 330-38 (2005).

merits. *See San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 333-34 (2005).

The case of Michael Mead is yet another example. Mr. Mead owned 1.6 acres of property in Cotati, California. He wanted to develop it with four duplexes.[16] In order to obtain the necessary development permit, municipal officials demanded that Mr. Mead comply with the City's affordable housing ordinance, which would have required Mr. Mead to: 1) construct at least two of the eight units as below-market units restricted for no less than 30 years for occupancy by moderate, low, or very low income households; 2) pay an in-lieu fee to the City; or 3) seek permission from the City to construct the required below-market units off-site, dedicate land to the City for its construction of below-market units, or provide a combination of on-site and off-site construction, in-lieu fees, and land dedication.[17]

Mr. Mead challenged the constitutionality of the exaction but lost because the ordinance included an option to pay a fee. The Ninth Circuit specifically found that "[a] generally applicable development fee is not an adjudicative land-use exaction subject to the 'essential nexus' and 'rough proportionality' tests" of *Nollan* and *Dolan*. *Mead v. City of Cotati*, 389 Fed. Appx. 637, 638-39 (9th Cir. 2010). But monetary

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[16] *See* Brief *Amicus Curiae* of Pacific Legal Foundation in Support of West Linn Corporate Park, LLC, *supra* note 9, at 6-7.

[17] *Id.*

exactions in the form of development fees may be just as extortionate as demands of real property when they are "designed to address a problem unrelated to the owner's use of property or be in an amount that is excessive for addressing the problems that do arise from the property."[18] In the absence of judicial scrutiny, that determination is never made.

In addition to development fees, some municipalities also structure non-real property exactions as "payments in lieu" – fees paid to local governments "in lieu of" something else, most commonly taxes or real property.[19] These fees are meant to compensate for revenue lost due to the nature of ownership or use

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[18] J. David Breemer, *Article: The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373, 398 (2002).

[19] For example, the Englewood, Colorado City Council recently approved a park dedication fee that requires residential developers to pay a $20,000 per acre fee in lieu of dedicating land for city parks. Clayton Woullard, *Englewood to Charge Developers a Fee In Lieu Of Setting Park Land Aside*, Denver Post, Sept. 26, 2012, *available at* http://dpo.st/QVbuP7. Municipalities across the country allow fees in lieu of land dedication. *See, e.g.*, Hollister, Cal. Mun. Code § 16.55.030- .050; Houston, Tex. Mun. Code § 42-252, -253; Newcastle, Wash. Mun. Code § 17.20.030; Baraboo, Wis. Mun. Code § 17.83. Some states even publish manuals that give municipalities explicit instructions on how to implement fee-in-lieu ordinances. *See, e.g.*, Pennsylvania Land Trust Association, *Public Dedication of Land and Fees-in-Lieu for Parks and Recreation: A Guide to Using Section 503(11) of the Pennsylvania Municipalities Planning Code* at 15-18 (Dec. 15, 2008), *available at* http://www.dcnr.state.pa.us/ucmprd2/groups/public/documents/document/dcnr_002299.pdf.

of a particular property. Payments in lieu of taxes ("PILOTs"), for example, are voluntary payments made by nonprofit organizations to compensate local governments for lost tax revenue. PILOTs are susceptible to abuse by municipal officials when they go from being voluntary to mandatory payments in exchange for government-issued permits.

For example, city officials in Scranton, Pennsylvania are looking for ways to leverage PILOTs to make up for their own budget shortfalls.[20] Scranton's economic recovery plan hinges on securing PILOTs from the city's largest nonprofit organizations, including the University of Scranton.[21] The city's ultimate goal is for PILOTs to make up 3% of its revenue and be expanded to include all non-profit organizations in the city. At the same time, the Scranton City Council has recently threatened to oppose all applications for zoning variances submitted by nonprofits.[22] The city's threat to oppose all nonprofits' zoning

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[20] Jim Lockwood, *Devil Is In Details In Scranton's New Recovery Plan*, Scranton Times Tribune, Sept. 16, 2012, *available at* http://thetimes-tribune.com/news/devil-is-in-details-in-scranton-s-new-recovery-plan-1.1373895.

[21] Jim Lockwood, *Scranton Eyes Its Seven Largest Nonprofits For Contributions*, Scranton Times Tribune, Aug. 2, 2012, *available at* http://thetimes-tribune.com/news/scranton-eyes-its-seven-largest-nonprofits-for-contributions-1.1353318.

[22] Jim Lockwood, *Nonprofit Organization Warily Eyeing Scranton's Feud With Tax-Exempt Institutions*, Scranton Times Tribune, Oct. 4, 2012, *available at* http://thetimes-tribune.com/news/nonprofit-organization-warily-eyeing-scranton-s-feud-with-tax-exempt-institutions-1.1382714.

variance applications while it simultaneously seeks ever-larger PILOTs from them is little more than a veiled plan of extortion. In the absence of judicial scrutiny, however, Scranton officials are free to require nonprofits to pay larger PILOTs as a condition of zoning variance approval.

Impact fees can, of course, satisfy *Nollan/Dolan*. The idea of impact fees is that they are *related to the impact* of development on the community. Where impact fees actually compensate for the expected impact of development, they will survive *Nollan/Dolan* scrutiny. But "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Where impact fees are wildly disproportionate to the anticipated impact of development, judicial scrutiny is the only way individuals can secure relief.

B. Municipalities use exactions to force individuals to give up constitutional rights.

In the absence of judicial scrutiny, municipalities use exactions to force individuals to give up constitutional rights in exchange for government permits. City officials in Carlsbad, California, for example, condition the granting of building permits on the waiver of voting rights protected by the state's constitution.

Under the California Constitution, before a municipality may pass the cost of public improvements on to individual property owners in the form of "assessments,"[23] it must hold an election in which all property owners in the proposed assessment district are entitled to vote. Cal. Const. Art. XIIID. But a Carlsbad, California ordinance requires property owners requesting building permits to pay the cost of "public improvements" up front, before an election can even take place. *See* Carlsbad, Cal., Mun. Code § 18.40.060. If a property owner cannot afford the assessment, he or she must sign a waiver, called a "Neighborhood Improvement Agreement," *see* Carlsbad, Cal. Mun. Code §§ 18.40.070, 18.40.090, consenting to the assessment and giving up any future right to vote in an assessment election. Carlsbad, Cal. City Resolution 2000-237 (July 25, 2000). The waiver not only binds current property owners, but also every future owner of the property as well. Carlsbad property owners thus have a choice: pay the city a form of assessment up front, or give up the right to ever object to assessments in the future.

Craig and Robin Griswold were faced with that choice when, in 2004, they requested a permit to build an addition to their single-family home. In exchange for the permit, Carlsbad officials demanded

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[23] Assessments differ from ordinary taxes in that they pay for improvements for a particular neighborhood, and only property owners in the affected neighborhood are required to pay them.

the Griswolds pay nearly $115,000 for various street improvements, including paving, sidewalk, curb, and gutter improvements, and underground and overhead utilities – none of which were implicated by the Griswold's construction plans.[24] If the Griswolds wanted to proceed with the addition, they had to choose between paying for the neighborhood improvements themselves or signing away their constitutionally protected right to vote on future assessments. City officials attempted to justify the enormous fee by explaining that "development is a privilege and development is allowed to be conditioned."[25]

The Griswolds ultimately signed the waiver under protest[26] and tried to challenge the exaction in court. But the non-real property exaction was never reviewed on the merits. Instead, the trial court dismissed the case on procedural grounds, *see Griswold v. City of Carlsbad*, No. 06-CV-1629WQH, 2007 U.S. Dist. LEXIS 72007, *11-14, *17-20 (S.D. Cal. Sept. 27, 2007), and the Ninth Circuit – in which non-real property exactions get no judicial scrutiny – upheld the dismissal, finding that the Griswolds waived their right to challenge the condition because

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[24] Brief *Amicus Curiae* of Pacific Legal Foundation in Support of Petitioners at 14, *Didden v. Port Chester*, 549 U.S. 1166 (2006) (No. 06-652).

[25] Michael Burge, *Property Rights At Issue*, San Diego Union-Trib. at NC-2, Aug. 16, 2006.

[26] A copy of the Griswold's waiver is available at http://eminentdomain.typepad.com/Griswoldwaiver.pdf.

they proceeded with construction after obtaining the permit. *See Griswold v. City of Carlsbad*, 402 Fed. Appx. 310, 311 (9th Cir. 2010) (unpublished) ("[T]he Griswolds' agreement to the deferral of the assessments and their construction of the improvements under their permit effected a valid waiver of their right to challenge the conditions of their permit.").

Some exactions blatantly impinge on property owners' "right to exclude" others from their property as conditions of obtaining government permits. For example, in 1990 the city of Seattle, Washington, passed a "Tenant Relocation Assistance Ordinance" that required landlords to pay relocation assistance in the amount of $2,000 to low-income tenants displaced "by demolition, change of use, substantial rehabilitation, or removal of use restrictions." *Garneau v. City of Seattle*, 147 F.3d 802, 804 (9th Cir. 1998) (*quoting* Seattle, Wash. Mun. Code § 22.210.130(A)). In other words, property owners were required to pay relocation assistance as a condition of obtaining a development permit. Property owners challenged the ordinance, but the trial court and then the Ninth Circuit rejected the property owners' takings claim. The Ninth Circuit specifically noted that neither *Nollan* nor *Dolan* "provide a court with any guidance to determine whether imposition of a [fee] constitutes a taking."[27] 147 F.3d at 812.

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[27] The Ninth Circuit found that *Dolan* did not apply to the property owners' takings claim for two reasons: (1) *Dolan* applies

(Continued on following page)

Seattle's ordinance never could have survived *Nollan/Dolan* scrutiny. As Judge O'Scannlain pointed out in dissent, the "proposed development . . . causes no discernible harm whatsoever because . . . [w]hether or not a landlord develops his land, the tenants must bear moving expenses when they vacate the premises. This burden should come as no surprise to tenants, who, *by definition*, are legally obliged to move out eventually, perhaps involuntarily." 147 F.3d at 817-18 (O'Scannlain, J., dissenting) (emphasis in original). Indeed, a landlord's "right to evict the tenant at the expiration of the lease . . . is known as the 'right to exclude,' which . . . is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* Seattle's ordinance conditioned permit approval on waiving that right subject to the payment of displaced tenants' relocation expenses, the magnitude of which bore "no relation whatsoever to the tenants' actual or even expected moving costs." *Id.* at 818.

That municipalities may impose conditions on development is not in dispute. But when those conditions involve real property exactions, courts review them to make sure they make sense. When municipal

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only to as-applied takings challenges, not to facial takings challenges," and (2) "*Dolan* does not address when a taking has occurred, instead, it addresses only how close a fit the exaction . . . must have to the harms caused by development." 147 F.3d at 811.

officials demand that property owners waive constitutional rights as a condition of permit approval, that demand is no less deserving of judicial scrutiny.

C. Municipalities use exactions to circumvent legal safeguards of private property rights.

In the absence of judicial scrutiny, municipalities also use exactions as an end-run around legal safeguards of private property rights. City officials in the Village of Port Chester, New York, for example, attempted to extort nearly $1 million out of local property owners Bart Didden and Domenick Bologna using the threat of eminent domain.

Didden and Bologna jointly owned a piece of property in Port Chester. Part of that property lay within a redevelopment district and had been designated for future retail development. Several years after the redevelopment district was approved, representatives of CVS Pharmacy approached Didden and Bologna about the possibility of constructing a CVS Pharmacy on their property.[28] Didden and Bologna applied for the necessary approvals from Port Chester to proceed with the project, and they received preliminary site approval. But after Didden and Bologna had already begun the process of obtaining the necessary approvals for the project, Village officials

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[28] Petition for a Writ of Certiorari at 3-4, *Didden v. Port Chester*, 549 U.S. 1166 (2007) No. (06-652).

directed them to meet with Gregg Wasser, one of the principals of G&S Port Chester (the chosen developer for the redevelopment district).[29]

At that meeting, Wasser demanded that Didden and Bologna pay him $800,000. Wasser calculated the $800,000 demand based on his estimate that developing the property as a retail pharmacy would yield approximately $2,000,000 in profit. If Didden and Bologna refused, Wasser would cause Village officials to commence a condemnation proceeding to take the portion of their property in the redevelopment district. In other words, paying $800,000 was the condition for which Didden and Bologna would receive the purported "government benefit" of not having their property taken by eminent domain. They refused the extortionate demand, and Port Chester filed a condemnation petition to acquire their property the following day. The purpose of the condemnation action? To transfer it by lease to G&S Port Chester to build a Walgreens.[30]

Over the next several months, Didden and Bologna repeatedly told Village officials about the $800,000 demand and requested that it suspend the condemnation.[31] But the Village approved of Wasser's actions.

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[29] The Village's approval of the redevelopment district included a finding of "public purpose" for the future use of eminent domain. *Id.* at 3.

[30] *Id.*

[31] *Id.* at 5-6.

Indeed, it was Wasser who decided the property would be taken by eminent domain. Rather than suspend the condemnation proceeding, the Village directed Didden and Bologna to negotiate with Wasser, even though it was Wasser who caused the Village to initiate the condemnation proceeding, and it was Wasser who would directly benefit from it.

Didden and Bologna tried to challenge the attempted extortion and subsequent condemnation in federal court, but the Southern District of New York dismissed the case.[32] *Didden v. Port Chester (Didden I)*, 322 F. Supp. 2d 385, 390 (S.D.N.Y. 2004). The Second Circuit affirmed, ruling in part that the $800,000 demand did not constitute an unlawful exaction. *Didden v. Port Chester (Didden II)*, 173 Fed. Appx. 931, 933 (2d Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007).

As with the Griswolds' case, no meaningful judicial scrutiny was dedicated to the blatant attempt at extortion and abuse of power on the part of Village officials. *See Didden I*, 322 F. Supp. 2d at 390 (holding that "threats to enforce a party's legal rights are not actionable" and noting that plaintiffs' "allegation of an extortionate demand of $800,000 to avoid condemnation adds nothing of legal significance to Plaintiffs' claims"); *Didden II*, 173 Fed. Appx. at 933 (summarily

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[32] The district court explained that because the developer could cause the Village to condemn the property pursuant to a redevelopment plan, the developer's threat to do what he was entitled to do by law did not violate the Constitution. *Didden v. Port Chester*, 322 F. Supp. 2d 385, 390 (S.D.N.Y. 2004).

finding that the $800,000 demand was not "an unconstitutional exaction in the form of extortion"). But had Village officials demanded Didden and Bologna deed a portion of their land, rather than turn over a large sum of money, in exchange for not having their property taken, the exaction would have been reviewed under the "essential nexus" and "rough proportionality" tests of *Nollan* and *Dolan*. Using the threat of condemnation to exact money from property owners is no less deserving of judicial scrutiny. Indeed, permitting this type of exaction absurdly allows a municipality to exact money from a property owner which it can then use to pay compensation when it takes the property through eminent domain.[33]

Using exactions to perpetrate eminent domain abuse is only one way municipalities use exactions as an end-run around legal safeguards of property rights. Where the government imposes restrictions that abridge a property owner's right to exclusivity, the government is required to pay for them. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014-15 (1992). But the government may impose the same restrictions without having to pay for them by simply making the restrictions a condition of permit approval.

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[33] This is exactly the situation Judge O'Scannlain posited in his dissent in *Garneau*. *See* 147 F.3d 802, 819 n.5.

That is what happened to Paul and Janet Smith, who owned a 10-acre lot in rural Mendon, New York. The Smiths wanted to build a single-family home on their lot and applied to the town for the necessary development permits. *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1215 (N.Y. 2004). Town officials granted preliminary site approval on the condition that the Smiths file "a conservation restriction on any development" within the portion of their property that fell within a designated "environmental protection overlay district" ("EPOD").[34] *Id.*

The conservation restriction would have bound the Smiths and any subsequent owners in perpetuity, and it would have prohibited them from "[c]onstruction, including, but not limited to structures, roads, bridges, drainage facilities, barns, sheds for animals and livestock and fences, the [c]lear-cutting of trees or removal of vegetation or other ground cover, changing the natural flow of a stream or disturbing the stream bed, installing septic or other sewage treatment systems, and using motorized vehicles." *Id.* at 1216 (internal quotation marks omitted). In essence, it would have prevented the Smiths from doing anything with portions of their property.

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[34] The EPODs themselves also restricted what the Smiths could do with their property. However, the EPODs were subject to amendment by the Town, whereas the conservation restriction encumbered the property in perpetuity. 822 N.E.2d at 1216. In addition, "[u]nder the EPOD regime, the Town could only issue citations for violations, whereas with the conservation restriction, it could seek injunctive relief." *Id.*

The Smiths rejected the condition and challenged it in court. The trial court concluded that the conservation restriction was an exaction – though not an illegal one – but the intermediate appellate court reversed, finding that the condition was not an exaction because it did not require the dedication of property to "public use." *Smith v. Town of Mendon*, 4 A.D.3d 859, 860 (N.Y. App. Div. 2004) (*quoting City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999)). The New York Court of Appeals affirmed, reasoning that *Dolan* only applies to challenges based on exactions, not when "the landowner's challenge is based on denial of development." 822 N.E.2d at 1218. But contrary to the Court of Appeals' opinion, the conservation easement at issue was exactly the type of nonpossessory interest in real property "which imposes use restrictions on the landowner . . . for the benefit of the public," *id.* at 1225 (Read, J., dissenting) – and exactly the type of exaction that warrants judicial scrutiny.[35]

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[35] A California trial court struck down a similar easement after the California Coastal Commission had attempted to require one couple to dedicate an agricultural easement to the state over 143 acres of their property in exchange for a permit to build a 6,000 square foot single-family home. *See* J. David Breemer, *Decision in Sterling "Forced Farming" Case: Agricultural Easement "Flat Out Unconstitutional,"* PLF Liberty Blog (June 25, 2010, 1:43 PM), http://plf.typepad.com/plf/2010/06/decision-in-sterling-forced-farming-case-agricultural-easement-flat-out-unconstitutional.html. The easement would have restricted use of almost all of the Sterlings' land exclusively to farming forever. A California trial court struck down the condition imposing the easement, finding that it was an illegal exaction. Specifically, the court held that the imposition of the affirmative agricultural easement

(Continued on following page)

In the absence of judicial scrutiny, however, municipalities are free to use exactions to avoid liability for basic property rights violations.

D. Municipalities use exactions to force individuals to undertake expensive building and mitigation projects.

In the absence of judicial scrutiny, municipal officials also use exactions to force individuals to perform expensive labor such as off-site mitigation or construction. In this case, for example, the St. Johns River Water Management District in Orange County, Florida required petitioner Coy Koontz to perform expensive mitigation on property several miles away from his as a condition of obtaining a permit to develop his own land. *See* 77 So. 3d at 1224.

In Philadelphia, Pennsylvania, the local Zoning Board of Adjustment has the power to demand virtually anything in exchange for granting a variance application. These demands need not – and indeed typically do not – have anything to do with the nature of the variance being sought. Rather, the Board often

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constituted "an unconstitutional taking, as it [was] disproportionate to the public impact of the house proposed. Further, the required nexus between the public impact and the affirmative agricultural easement ha[d] not been adequately substantiated." *Sterling v. Cal. Coastal Comm'n*, No. CIV 482448, Decision and Order Re: Plaintiff's Petition for Writ of Mandate (Cal. Sup. Ct. Cnty. of San Mateo Apr. 9, 2010), *available at* http://www.pacificlegal.org/document.doc?id=422.

imposes requirements – called "provisos" – that condition obtaining a variance on unrelated steps. In the absence of judicial scrutiny, these provisos are just as heavily abused as other types of non-real property exactions.

For example, when Ramesh Naropanth, owner of Cedar Street Supermarket, applied for a variance that would allow his neighborhood convenience store to sell sandwiches, he ended up having to satisfy a condition that had nothing to do with the variance. Mr. Naropanth already sold bread and deli meat. The variance would merely have enabled him to sell the two together in sandwich form. But Mr. Naropanth's first application for a zoning variance was flatly rejected. At the hearing on his application, community members insisted on outlandish demands utterly unrelated to the variance, including that he make financial contributions to various local causes. His second application was ultimately approved on the condition that he install expensive new security grates on his windows – a process that cost him nearly $8,000.[36]

Mr. Naropanth ultimately obtained the variance. But in the absence of judicial scrutiny, Philadelphia officials are free to force property owners to spend thousands of dollars to satisfy the random whims

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[36] Robert McNamara, Institute for Justice, *No Brotherly Love for Entrepreneurs: It's Never Sunny for Philadelphia's Small Businesses* at 9-10 (Nov. 2010), *available at* https://www.ij.org/images/pdf_folder/city_studies/ij-philly_citystudy.pdf.

of Board and community members. Indeed, in Mr. Naropanth's case, there was no connection whatsoever between his application for a zoning variance that would allow him to sell sandwiches and the condition that he install security grates.

Many extortionate conditions relate to the provision or construction of affordable housing in exchange for development permits. Government officials in Santa Fe County, New Mexico, for example, require property owners to sign an agreement to build "affordable housing units" and sell them to "county-approved buyers" in order to obtain city approval to subdivide their parcels. *See Alto Eldorado Ptnrs. v. City of Santa Fe*, No. 08-0175, 2009 U.S. Dist. LEXIS 47158, *4-6 (D.N.M. April 20, 2009).[37] Even though subdividing property might have no effect on the presence or lack of affordable housing in the county, the ordinance would nevertheless require property owners to build and sell affordable housing units on the county's behalf. Property owners challenged the condition in federal court as an illegal exaction. Even though they sought only declaratory and injunctive relief – and no compensation – their case was dismissed based on Supreme Court precedent requiring claims for just compensation to be litigated first in state and then federal court.

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[37] *See also* Paul J. Beard II, *Santa Fe "Affordable Housing" Case Appealed to Supreme Court*, PLF Liberty Blog (July 12, 2011 2:06 PM), http://plf.typepad.com/plf/2011/07/santa-fe-affordable-housing-case-appealed-to-supreme-court.html.

Sometimes demands of labor or money, like the provision of affordable housing, are framed as a choice: property owners can "choose" to perform labor or off-site mitigation as an "alternative" to paying fees. But a choice between two extortionate conditions is not a choice at all. Under San Francisco's Hotel Conversion and Demolition Ordinance, Mr. Lambert (owner of the Hotel Cornell) and the Fields (owners of the San Remo Hotel) would have been permitted to build replacement low-income housing themselves instead of paying the several-hundred-thousand dollar fees. But building affordable housing units for the city as a condition of developing one's own property is no less extortionate than being forced to give the city money to pay for that construction. The same can be said of the "choice" given to Mr. Mead by the city of Cotati: the option to build affordable housing "off-site" is no less extortionate than paying for the city to build it. Conditioning the grant of a permit on the requirement that a property owner perform expensive labor – like off-site mitigation in Mr. Koontz's case or the construction of affordable housing in many other cases – or pay a fee is equally extortionate. And either way, in the absence of judicial scrutiny, municipalities can use exactions to force individuals to undertake expensive building projects – or at the very least pay for them.

III. Subjecting Non-Real Property Exactions to *Nollan/Dolan* Scrutiny Would Enable Municipalities to Evaluate and Negotiate Permit Applications While Preventing Abuse.

Extending the *Nollan/Dolan* test to non-real property exactions would not extinguish the government's ability to evaluate and negotiate permit applications based on the anticipated impact on the community or environment. There is no "reason why limiting a government exaction from a developer to something roughly proportional to the impact of the development . . . will bring down the government." *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 639 (Tex. 2004). Rather, extending *Nollan/Dolan* to non-real property exactions would permit government officials to demand them where doing so makes sense – just as government officials are permitted to demand exactions of real property so long as they bear an "essential nexus" to the government purpose supporting the development restriction, and a "rough proportionality" to the impact of the proposed development.

In the jurisdictions in which the *Nollan/Dolan* test applies to monetary exactions, local governments impose fees that meet the "essential nexus" and "rough proportionality" standards. For example, the city of Beavercreek, Ohio enacted an ordinance to finance road construction made necessary by an intense period of new development. *Home Builders Ass'n v. City of Beavercreek (Beavercreek I)*, Nos. 97-CA-113 & 97-CA-115, 1998 Ohio App. LEXIS 4957, *4-7 (Ohio Ct. App. Oct. 23, 1998). Fees were assessed "based on the

category within which a particular new development fit" (*e.g.*, single or multi-family dwelling units, commercial or office developments). *Id.* at *7-8. These rates were calculated according to a formula meant to approximate the impact of each new development on the road system.[38] The ordinance had an appeal provision as well as a provision for review every two years. *Id.* at *8.

Local developers challenged the imposition of the impact fee as an unconstitutional taking, but the trial court upheld the ordinance under *Nollan* and *Dolan*. Based on its review of evidence and testimony regarding the impact fee system and the methodology for calculating fees, the trial court found "that a reasonable relationship existed between the city's need to construct new roadways and the traffic generated by new development," and also that, based on the methodology for calculating the fees, "the fees were reasonable and that a reasonable relationship existed between the fee paid and the benefits accruing to developers." *Home Builders Ass'n v. City of*

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[38] The formula started with the "total cost of the proposed roadway system [which was then] reduced by certain credits. The remaining cost was then divided by the total number of trip ends generated by all new development. This resulted in a 'fee per trip,' which was multiplied by the number of trip ends associated with a particular type of development. As an example, the impact fee team estimated that a new single family dwelling would generate ten new daily trip ends. After multiplying this number by the fee per trip of $59.40, the team arrived at the $ 594 impact fee for each new single family dwelling unit." *Beavercreek I*, 1998 Ohio App. LEXIS 4957, at *7-8.

Beavercreek (Beavercreek II), 729 N.E.2d 349, 357-58 (Ohio 2000). The appellate court reversed, but the Ohio Supreme Court agreed with the trial court that "the dual rational nexus test . . . based on the *Nollan* and *Dolan* cases" is the proper test "for evaluating the constitutionality of an impact fee ordinance when a Takings Clause challenge is raised." *Id.* at 156. The Ohio Supreme Court found that the trial court's conclusions under *Nollan/Dolan* were proper and upheld the impact fee. *Id.*

The Illinois Supreme Court upheld a similar transportation impact fee under *Nollan/Dolan*. Illinois' Road Improvement Impact Fee Law "provided a comprehensive scheme for the enactment of impact fee ordinances in counties with a population of over 400,000 and all home rule municipalities." *N. State Home Builders Ass'n, Inc. v. Cnty. of Du Page*, 649 N.E.2d 384, 388 (Ill. 1995). Under the act, impact fees were not to exceed "'a proportionate share of costs incurred by a unit of local government which are specifically and uniquely attributable to the new development paying the fee.'" *Id.* (*quoting* the code). County officials in Du Page, Illinois passed their own transportation impact fee ordinance pursuant to the enabling act. *Id.*

Local developers challenged the enabling act and local ordinance, but the Illinois Supreme Court upheld them under the tests articulated in *Nollan* and *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill. 2d 375, 380 (1960), Illinois' proportionality standard. Specifically, the court found that it was "clear

that a nexus exists between preventing further traffic congestion and providing for road improvements to ease that congestion," *id.* at 389, and also that the enabling act's requirement that impact fees imposed "must be 'specifically and uniquely attributable to the traffic demands generated by the new development paying the fee' . . . comports with the dictates of *Pioneer Trust*[.]" *Id.* at 390 (*quoting* code).

Just as with the Illinois and Ohio transportation impact fees, applying *Nollan/Dolan* does not prevent municipalities from imposing appropriate fees. For example, the roadway fee of $10,000 that was ultimately imposed by Elk Grove officials on the Griswolds' development, *see supra* Part II.B, could plausibly be proportional to the impact of their development on nearby roadways. So too could development fees imposed by cities to pay for sewer and other infrastructure improvements necessitated by new development be proportional to the impact of that development. Extending *Nollan/Dolan* to these types of exactions requires nothing more.

Furthermore, nothing prevents municipalities from assessing general taxes in order to fund municipal projects. For example, voters in Wildomar, California just voted to approve an annual $28 tax per household to fund municipal parks.[39] Requiring the

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[39] City News Service, *Riverside Cities' Ballots Include Taxes, Changes In Pay*, Desert Sun, Nov. 6, 2012, *available at* http://www.mydesert.com/viewart/20121105/NEWS03/311050033/Riverside-cities-ballots-include-taxes-changes-pay; *see also* Tim O'Leary,

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public – rather than targeted individuals – to pay for public improvements from which all will benefit is entirely appropriate, whereas insulating exactions from judicial scrutiny allows municipalities to unfairly place the burden of funding municipal improvements on permit applicants when they are singled out to bear public costs. *Cf. Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

As shown in Part II, *supra*, municipalities will take any available opportunity to use exactions to impose extortionate conditions on property owners. Meaningful judicial scrutiny of non-real property exactions does not prevent the government from imposing exactions. It simply ensures a meaningful cause-and-effect relationship between exactions – both of real and non-real property – and the social problems for which they are meant to compensate. Accordingly, *Nollan* and *Dolan* should apply with equal force to both real property and non-real property exactions.

Third Time Appears To Be Charmed As Wildomar Voters Narrowly OK Park Tax, Valley News, Nov. 9, 2012, *available at* http://www.myvalleynews.com/story/67593/.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the decision of the Florida Supreme Court and extend *Nollan/Dolan* to non-real property exactions.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-1447

IN THE

Supreme Court of the United States

COY A. KOONTZ,

Petitioner,

-v-

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF OF *AMICUS CURIAE* THE LAND USE INSTITUTE, LTD. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Land Use Institute, Ltd. ("LUI") is a non-profit think tank that studies land use planning and regional land use policies in order to better educate both policy makers and the public as to market-oriented land use policies and the importance of legal rules that respect and support property rights.

LUI believes that a properly functioning real estate market is integral to a community's successful growth. Government's proper role in the workings of a well functioning real estate market is to preserve and protect property rights, allowing growth and adaptation to changes in the use of real property in the community. However, where governments act outside legal constraints, they interfere with the natural progress of real estate development and land use in general.

LUI views this case as an important opportunity for this Court to further establish appropriate boundaries for the conduct of land use agencies when evaluating land use applications. This case will establish whether or not land use agencies may coerce improper concessions from property owners as a condition to their exercising their property rights. The outcome of this case will have significant implications for both personal liberty and the integrity of the real estate markets.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Florida Supreme Court raises the specter that, were Petitioner's temporary takings claim to prevail, government agencies will simply deny development approvals outright in order to avoid claims of compensable exactions under the Fifth Amendment Taking's Clause. *St. Johns River Water Management District v. Koontz*, 77 So. 3d 1220, 1230-31 (Fla. 2011). The Florida Supreme Court's assertion is wrong. This policy consideration is stated without any support whatsoever, and the Florida Supreme Court fails to acknowledge that the purported specter has no application to most land use approvals and that government agencies are quite capable of acting within constitutional limitations.

Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) recognized that governments can seek to impose conditions on development permits, which could otherwise be denied, provided the permit conditions sought to be imposed satisfy the very workable minimal constitutional requirements of "essential nexus" and "rough proportionality."

The specter offered by the Florida Supreme Court is wrong for several reasons First, the opportunity for a land use agency to impose conditions only arises in a small portion of land use applications. In most circumstances, a property owner can make a record which supports approval as of right. Under such circumstances, there is no opportunity for the imposition of conditions or the seeking of an exaction. Thus, there is no risk of takings liability for the agency, and development proceeds. It is only those

more narrow circumstances where the record does not support approval that the imposition of conditions even arises. Thus, any risk of liability arises only in a small portion of development use situations.

Further, agencies can and do rationally and methodically adapt to new land use rules. Development can present considerable public benefit, and agencies have a strong incentive to develop reasonable and lawful land use conditions that would mitigate adverse impacts and therefore allow an otherwise objectionable development to proceed.

Empirical studies demonstrate that this is exactly what happens. In the wake of *Nollan* and *Dolan*, planners developed improved procedures and engaged in more thoughtful and systemic planning than before those rules were imposed by this Court. The result has been superior planning and enhanced behavior by governments.

The *Nollan* and *Dolan* standards afford ample and substantial leeway within which government agencies can constitutionally act, and will want to act, to approve desired development, which could otherwise be denied. The standards level the playing field for a property owner *vis-a-vis* government and prohibit government from seeking to impose coercive and confiscatory conditions in the narrow circumstances where government has the discretion to impose conditions in approving development it could otherwise deny.

ARGUMENT

IF THE JUDGMENT BELOW IS REVERSED, THERE IS NO SIGNIFICANT DANGER OF PERMITTING AUTHORITIES ARBITRARILY DENYING PERMITS WITHOUT NEGOTIATION

The Florida Supreme Court raises the specter that, were Petitioner's temporary takings claim to prevail, government agencies will simply deny development approvals outright in order to avoid claims of compensable exactions under the Fifth Amendment Taking's Clause. *St. Johns River Water Management District v. Koontz*, 77 So. 3d 1220, 1230-31 (Fla. 2011). The Florida Supreme Court's assertion is wrong. This policy consideration is stated without any support whatsoever, and the Florida Supreme Court fails to acknowledge that the purported specter has no application to most land use approvals and that government agencies are quite capable of acting within constitutional limitations.

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development, which could otherwise be denied. The standards level the playing field for a property owner *vis-a-vis* government and prohibit government from seeking to impose coercive and confiscatory conditions in the narrow circumstances where government has the discretion to impose conditions in approving development it could otherwise deny.

A. Potential Takings Liability from a Compensable Exaction Could only Arise from Certain Land Use Applications Where an Applicant Fails to Make a Record Justifying an Approval as of Right.

As an initial matter, it is important that the issues before the Court be placed in the proper context with respect to the universe of land use applications. Generally speaking, land use applications are subject to objective standards. If an applicant makes a sufficient record, an applicant is typically entitled to approval as of right. See, e.g., *Broward County v. Narco Realty, Co.*, 359 So. 2d 509, 511 (Fl. Ct. App. 1978) (if applicant meets all legal requirements for subdivision approval, county has no discretion to refuse the approval); *Pizzo Mantin Group v. Randolph*, 645 A.2d 89, 96 (N.J. 1994) (planning board must approve subdivision unless it fails to comport with requirements in subdivision or zoning ordinances); *Boxell v. Planning Commission of City of Maumee*, 225 N.E. 2d 610, 616 (Ohio Ct. App. 1967) (" . . . if the plaintiffs' proposed subdivision without plat was not contrary to the subdivision ordinance and zoning ordinance of the City of Maumee, and not contrary to any state statutes, and full compliance was shown by plaintiffs with such ordinances

and statutes, it was then unreasonable and unlawful for the Planning Commission of Maumee to disapprove the subdivision without plat"); *Vick v. Bd. of County Commissioners*, 689 P.2d 699 (Colo. Ct. App. 1984), *overruled on other grounds*, *Board of County Comm'rs v. Conder*, 927 P.2d 1339 (Colo. 1996), (subdivision plat may not be disapproved if subdivision regulations have been complied with).

Further, state law typically provides that land use determinations not based on clear objective standards are void as arbitrary and capricious. *See, e.g., Powers v. Common Council of the City of Danbury*, 222 A.2d 337, 339 (Conn. 1966) ("The portion of the zoning regulations which allows a special permit without appropriate standards is void"); *In re Handy,* 764 A.2d 1226, 1236 - 1239 (Vt. 2000) (statute which provided no standards which constrained board's decision was unconstitutional); *Wakelin v. Town of Yarmouth,* 523 A.2d 575 (Maine 1987) (ordinance which lacked standards to constrain board's discretion was void).

Thus, where an owner of real property seeks to develop his property, and that development requires a permit or an approval by a government agency, such a determination will be made upon a record created in the course of the developer's application, and the decision of the agency must be based on objective standards provided by law. If the record supports an approval, the applicant having demonstrated compliance with the standards, the approval must be given, and an improper denial will typically be subject to review and reversal by a court of competent jurisdiction.

Such is the case with the typical land use determination. Where the applicant makes a sufficient record, approval is available of right, and there is neither any room nor any place for conditions to be imposed for the exaction of either real property, money, or other thing of value from the applicant by the agency.[2] This entire category of proceedings is immune to the dire prediction of the Florida Supreme Court.

It is only where the record is insufficient to require an approval, that is, where the agency has the right to deny the application, that conditions which could bloom into exactions resulting in takings liability might arise. In such a case, though the agency could deny the application because of some adverse impact from the development, it may nevertheless, in its discretion, seek instead to approve the development and impose one or more conditions to the approval which serve to mitigate the adverse impact. That is, the condition is intended to eliminate or mitigate the impact and in a manner of speaking "cure" that aspect of the application which would otherwise justify a denial.

Such is illustrated in *Nollan*. In *Nollan*, the property owners had applied for a permit to demolish a small bungalow and replace it with a three bedroom house. To do so they required a permit from the California Coastal Commission ("CCC"). 483 U.S. at 827. After seeking to impose a condition on approval without conducting a

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[2] Significantly, the Court of Appeal of Florida concluded that the dedication of the conservation area, to which Petitioner did agree, was enough to mitigate the impacts of development. *St. Johns River Water Management District v. Koontz*, 5 So. 3d 8, 12 (Fla. Ct. App. 2009)

proper hearing, the CCC was required by the Ventura County Superior Court, to conduct a public hearing on the application. The CCC made findings of fact that "the new house would increase blockage of the view of the ocean, thus contributing to the development of "a 'wall' of residential structures"" *Id.* at 828. The CCC approved the application with the condition that the property owner dedicate an easement allowing public access across their property. *Id.* at 829.

This Court proceeded to decide the case by assuming that the CCC could have denied the permit outright. *Id.* at 836. In developing the "essential nexus" test, the question for the Court was whether the condition served the same police power purpose as an outright denial. *Id.* Thus, the only legitimate purpose of a condition is to mitigate that aspect of the application that could have supported a denial. Accordingly, the issue of whether a condition is a legitimate effort at mitigation or an exaction giving rise to takings liability only arises in the limited circumstances where the property owner cannot make a record that would mandate an approval as of right.

In view of the foregoing, the policy concern raised by the Florida Supreme Court would not even present itself in most land use situations. Where the applicant makes a record supporting approval, development proceeds unabated. The supposed fear of liability from the imposition of conditions raised by the Florida Supreme Court presents no risk at all most of the time, and development carries on. This Court described exactions such as faced by Petitioner as "an out-and-out plan of

extortion." *Id.* at 837. Such a small risk can hardly justify allowing such extortion to continue.

B. The Power to Impose Exactions Represents a Coercive Tool Which Distorts the Balance of Power in Favor of the Government.

Another reason that the Florida Supreme Court is incorrect in fearing a slew of arbitrary denials if Petitioner's position is accepted by this Court is that the unbridled power to impose exactions is a coercive tool that inherently distorts the negotiation process in favor of the government.

As the facts of this case demonstrate so unfortunately, a permitting authority may hold up development for years by demanding exactions which seek to obtain unlawful concessions from a property owner. This is because the agency does not bear the cost of its unlawful demand. If a demand is made by the agency and, after years, the demand ultimately proves to be unlawful, the full cost of the agency's misconduct is thrust entirely on the property owner who was prevented from developing his property by refusing to accede to the unlawful exaction, as Petitioner was here. This creates an enormous incentive for agencies to abuse that power (since it is costless) and constitutes a substantial coercive hammer the agency may employ against the property owner.

Imposing temporary taking liability on the government merely serves to correct this imbalance. It forces the government to internalize the cost of an unlawful demand,

that is, the government bears the cost of an unlawful demand rather than the property owner. The result is that the government must include the costs associated with an unlawful demand in formulating the types of demands it makes. Without such exposure, an agency may make whatever outlandish demands it can conceive of hoping that the threat of protracted delay (and its attendant cost) will bring the property owner to its knees. The result is that the agency has succeeded in coercing a result that it could not lawfully obtain but for the imbalance of power.

Government agencies are rational actors. The decision to approve an application with conditions rather than deny an application represents a conclusion by the agency that the public is better off with the development than without it. If it satisfies the "essential nexus" and "rough proportionality" rules of *Nollan* and *Dolan*, an imposed condition eliminates or mitigates the negative aspects of a proposed development. Thus, an approval with lawful conditions represents a net benefit for the public and a win for bureaucrats and politicians. This is a strong incentive for agencies to approve with lawful conditions rather than deny outright.

As rational actors, agencies are perfectly capable of incorporating the risks of temporary taking liability into their formulation of conditions. The facts of *Nollan* and *Dolan* bear this out. In *Nollan* the condition was ruled an exaction because it bore no nexus to the impact of the development. That is, the condition did not serve to ameliorate the impact identified by the CCC. This Court concluded that the only way to find a fit between the

condition and the impact was to play words games. The Court noted:

> It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house.

483 U.S. at 838.

In *Dolan*, this Court found that there was no "rough proportionality" because the City made no effort to connect quantitatively the impact of the development with the need for the bicycle path. 512 U.S. at 395.

In both *Nollan* and *Dolan* the failure of the government was fairly egregious. Neither case imposes particularly onerous requirements on agencies in formulating lawful conditions. Accordingly, there is no reason to believe that accepting the Petitioner's position will send agencies running for the hills. Suggesting that government agencies will simply deny all applications before them if they are forced to incorporate potential takings liability into their formulation of conditions is like suggesting that butchers will stop selling meat because the law is such that they could be held liable for tainted hamburger. Butchers conform their conduct to avoid such liability, and so will government agencies.

The fear that arbitrary denials will result from reversing the judgment below is unfounded.

C. Empirical Studies Prove That Government Agencies are Readily Capable of Methodically and Rationally Incorporating Land Use Rules Into Their Behavior.

The foregoing conclusion, that agencies can and will rationally adapt their behavior to incorporate new land use rules, is not only supported by logic and a basic understanding of land use procedures but is also supported by empirical evidence.

In 2001, Ann E. Carlson, Professor of Law at UCLA, and Daniel Pollak, an Environmental Policy Analyst at the California Research Bureau of the California State Library, conducted an extensive study of the experience of California municipalities in the wake of *Nollan* and *Dolan* and their progeny. *See* Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 103 (2001). Their findings are highly instructive as to how agencies react to a changing legal landscape.

Although the study examines a variety of issues, most relevant to this brief are the authors' findings regarding the reaction of land use planners advising land use agencies to *Nollan* and *Dolan* and the manner in which they have readily adapted to the changed legal environment. Particularly telling is this summary:

> . . . we found that an overwhelming percentage of California planners now view the *Nollan* and *Dolan* cases not as an

> encroachment upon their planning discretion but instead as establishing "good planning practices."

Id. at 105. The authors explain:

> The [*Nollan* and *Dolan*] decisions seem to have nudged many localities into more systematic, comprehensive planning through the preparation of reports and studies justifying and documenting the rationale for exacting money or land from developers.

Id.

Thus, the authors' findings demonstrate that the imposition of constitutional constraints under *Nollan* and *Dolan* has actually assisted planners in improving their procedures. This is because these rules do not punish the imposition of conditions *per se* but simply "penalize ad hoc decisions to impose exactions . . ." *Id.* at 115. The result is improved and more finely tailored decision making.

One observation in the wake of *Nollan* and *Dolan* is that planners have demonstrated new creativity in imposing conditions, often favoring impact fees in many instances, which can be more readily tailored to specific circumstances. *Id.* at 137. This demonstrates that agencies can and do easily comply with the requirements of *Nollan* and *Dolan* and that they need not and will not fear takings liability because compliance with constitutional requirements can be readily and predictably accomplished.

This study demonstrates that the specter of arbitrary denials engendered by fear and panic on the part of government land use agencies is entirely unfounded. Agencies can and do adapt readily and rationally to new land use rules. In particular, the *Nollan* and *Dolan* rules have resulted in improved land use procedures and more careful and thoughtful land use decision making on the part of government. The policy fears of the Florida Supreme Court are groundless. Accordingly, there should be no concern that ruling in favor of Petitioner will result in any adverse impact to development efforts. The judgment below should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Florida should be reversed.

Respectfully submitted,

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NOVEMBER 28, 2012

AMICUS CURIAE BRIEF

No. 11-1447

In The
Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

Brief Amici Curiae Supporting Petitioner, by

Nat'l Assn. of Home Builders, Real Estate Roundtable, Public Lands Council, Nat'l Mining Assn., Nat'l Multi Housing Council, BOMA, NAIOP, Nat'l Assn. of Realtors®, Nat'l Apartment Assn., American Farm Bureau Fed., Cal. Building Industry Assn., Fla. Home Builders Assn., Int'l Council of Shopping Centers, Nat'l Cattlemen's Beef Assn., Nat'l Assn. of Real Estate Investment Trusts®, and Chamber of Commerce of the United States of America

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INTEREST OF *AMICI CURIAE*

The undersigned *amici curiae* file this brief in support of the Petitioner.[1]

The composition of each *amicus* association on this brief is individually described in the attached Appendix. What unites them in this single presentation is a strong belief in the necessity of protecting the rights of private property owners as a critical lynchpin of American democracy. They have a particular interest in this case because their members are regularly confronted by government regulators seeking exactions of either property or money as a condition to the issuance of a permit. They jointly seek clarification that this Court's rules regarding land exactions apply equally to monetary exactions.

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[1] Counsel for the *amici curiae* authored this brief in whole and no other person or entity other than the *amici curiae* on whose behalf this brief is filed, their members or counsel have made a monetary contribution to the preparation or submission of this brief. The parties have jointly given their consent to the filing of *amicus curiae* briefs and have filed their letters of consent with the Court. Counsel for the *amici curiae* timely notified counsel for the parties that we intended to file this brief.

SUMMARY OF ARGUMENT

1. No matter how well intentioned the government may be, the Constitution was not designed to make government's life easier at the expense of private citizens. Quite the contrary. As this Court put it with simple elegance:

> "[M]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 [1987].)

The District can be expected to argue here, as it did below, that it was simply doing its job of protecting the environment when it demanded that Mr. Koontz perform off-site "mitigation" (in addition to dedicating the bulk of the property he wanted to develop) in exchange for a permit to make lawful use of a portion of his land. That may rationalize things for the District, but it does not constitutionalize its demand for cash and services. As discussed hereafter, good intentions cannot validate constitutional incursions.

2. This Court made it clear in *Dolan v. City of Tigard*, 512 U.S. 374, 391, n. 8 (1994) that the burden of showing the need for an exaction as the *quid pro quo* for obtaining a land development permit lay on the government regulatory entity. That is not only good law, it is good sense. After all, it is the regulator that is seeking to effect a change in the status quo by having a private citizen contribute either land, work, or cash to achieve a governmental purpose. Yet the Florida Supreme Court and the District sought to stand this salutary precept on its head by making the property owner prove that it should not be forced to pay the exaction. There is no reason for this Court to depart from its settled rule.

3. Government can perform its obligations without violating the constitutional rights of citizens.

ARGUMENT

I.

GOOD GOVERNMENT INTENTIONS DO NOT VITIATE THE NEED FOR COMPENSATION — IN FACT, THEY REINFORCE IT

Plainly, there must be some limit on the ability of government agencies to impose conditions on the issuance of permits.

Otherwise, no citizen's rights as to anything would be secure. This Court's admonition in *Frost & Frost Trucking Co. v. Railroad Commn.*, 271 U.S. 583, 594 (1926) bears recall:

> "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all."[2]

For that reason, of course, there is a constitutional limit. Indeed, the central point of the Bill of Rights was to curb the power of government. (*Stanley v. Illinois*, 405 U.S. 645, 656 [1972]; *Boddie v. Connecticut*, 401 U.S. 371, 375-376 [1971].)

Petitioner's brief on the merits fully discusses the unconstitutional conditions doctrine and its application in a wide variety of cases, so that body of law need not be repeated here. Instead, this brief will focus on the policies as expressed by this Court that underlie that doctrine and mandate its

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[2] See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), listing numerous decisions of this Court invalidating conditions placed on obtaining some governmental benefit, even those denominated mere privileges rather than rights.

protection under the circumstances presented by this case.

A.

The Fifth Amendment is Designed to Restrict Legitimate Governmental Action

The discussion in this section is necessary because some agencies (like the District here) and some courts (like the Florida Supreme Court) believe that, if the government's action is otherwise legitimate and proper then there can be no takings liability. That idea is wrong.

The District has defended its actions, *inter alia*, on the ground that its role as a protector of Florida's wetlands justifies the imposts on Mr. Koontz as conditions for allowing lawful development of his land. (See, e.g., BIO at 2-7.) That argument is misdirected. Indeed, it is not even relevant. None of these *amici curiae* (nor, we suspect, Mr. Koontz) disputes the District's role under Florida law. However, the Fifth Amendment is not concerned with the propriety or virtue of the regulator's purpose in demanding the exaction of money or property as a condition to granting development permission. Nothing in the law allows the District to put the cost of doing its

environmental job on Mr. Koontz's shoulders. Indeed, the law is otherwise.

Like so many constitutional takings cases, this case is about *means*, not *ends*. What is at issue is *not* whether the District can protect Florida's wetlands, but whether it can do so by demanding that Mr. Koontz pay to restore that environment in a manner not proportional to the impact of the project Mr. Koontz proposed to develop. As the Supreme Judicial Court of Massachusetts aptly observed:

> "In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the Department of Conservation to look after the interests of the former, and it is the duty of the courts to stand guard over constitutional rights." (*Commissioner of Natural Resources v. S. Volpe & Co.*, 206 N.E.2d 666, 671 [Mass. 1964].)

"[S]tand[ing] guard over constitutional rights" means enforcing the 5th Amendment's protection of property owners even — indeed, especially — when government appears to be pursuing a virtuous goal.

Thus, one non-issue should be set aside at once: the Fifth Amendment deals with *proper* governmental action, not torts. In other words,

in order to find a taking and either require compensation (*First English*) or preclude the government's action (*Nollan v. California Coastal Commn.*, 483 U.S. 825 [1987]), it is necessary that the government action be legitimate, i.e., the only constitutional issue is the failure to compensate.[3]

For the proper exercise of the police or eminent domain power, the underpinning of such a beneficent purpose must exist. That much was settled no later than 1922, when this Court examined a statute designed to stop land subsidence caused by underground coal mining and concluded that the prerequisites for exercise of both police power and eminent domain were present:

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[3] See also *Florida Rock Indus, Inc. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994): "It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest . . . ." More than that, it assumes that the Government is acting pursuant to lawful authority. If not, the action is *ultra vires* and void. (Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 [1952] [unlawful wartime seizure voided] with *United States v. Peewee Coal Co.*, 341 U.S. 114 [1951] [compensation mandatory after lawful wartime seizure].)

> "We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of the power of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 [1922].)

More recent authority echoes that conclusion: "the Takings Clause presupposes that the government has acted pursuant to a valid public purpose." (*Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 543 [2005].)

B.

Otherwise Valid Government Action Constitutionally Requires Compensation When Private Property is Taken for Public Use

Once it is determined that the government action is done to achieve a legitimate goal, then the means chosen must be examined against the constitutional matrix to ensure that private rights have not been violated.

Pennsylvania Coal was merely one in a long line of decisions in which this Court —

speaking through various voices along its ideological spectrum (*Pennsylvania Coal* having been authored for the Court by Justice Holmes) — patiently, and consistently, explained to regulatory agencies that the general legal propriety of their actions and the need to pay compensation under the Fifth Amendment present different questions, and the need for the latter is not obviated by the virtue of the former. Emphasizing the point, the dissenting opinion in *Pennsylvania Coal* had argued the absolute position that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking." (260 U.S. at 417.) Eight Justices rejected that proposition.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), New York's highest court upheld a statute as a valid exercise of the police power, and therefore dismissed an action seeking compensation for a taking. This Court put it this way as it reversed:

> "The Court of Appeals determined that §828 serves [a] legitimate public purpose . . . and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.*"

(*Loretto*, 458 U.S. at 425; emphasis added [Marshall, J.].)

Similarly, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Corps of Engineers had decreed that a private marina be opened to public use without compensation. This Court disagreed, and explained the relationship between justifiable regulatory actions and the just compensation guarantee of the Fifth Amendment:

> "In light of its expansive authority under the Commerce Clause, there is *no question* but that Congress *could* assure the public a free right of access to the Hawaii Kai Marina if it so chose. *Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question.*" (*Kaiser Aetna*, 444 U.S. at 174; emphasis added [Rehnquist, J.].)

That is why this Court concluded in *First English* that the Fifth Amendment was designed "to secure *compensation* in the event of *otherwise proper interference* amounting to a taking." (482 U.S. at 315; [Rehnquist, C.J.]; first emphasis, the Court's; second emphasis added.)

In a similar vein are cases like *Preseault v. I.C.C.*, 494 U.S. 1 (1990) (Brennan, J.); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (Blackmun, J.); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (Rehnquist, J.); and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (Brennan, J.). In each of them, this Court was faced with the claim that Congress, in pursuit of legitimate objectives, had taken private property without just compensation in violation of the Fifth Amendment. The governmental goal in each was plainly legitimate (respectively, the creation of recreational hiking and biking trails over abandoned railroad right-of-way easements, obtaining expert input prior to licensing of pesticides to protect the consuming public, dealing with the issue of compensation in the aftermath of the Iranian hostage crisis, and widespread railroad bankruptcy). Nonetheless, the Court did not permit those proper legislative goals to trump the constitutional need for compensation when private property was taken in the process. In each, the Court directed the property owners to the Court of Federal Claims to determine whether these exercises of legislative power, *though substantively legitimate*, nonetheless

required compensation to pass constitutional muster.[4]

This bedrock principle of the law of constitutional remedies goes back to the unanimous decision in *Hurley v. Kincaid*, 285 U.S. 95 (1932) (Brandeis, J.), where the Court held that the remedy for a taking *resulting from valid governmental action* is just compensation, not judicial second-guessing of governmental policies and decisions through disruptive injunctions.[5]

In *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987) (Scalia, J.), the Court examined California's plan to create a public easement

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[4] To this end, the Fifth Amendment's just compensation guarantee has been held self-executing. The availability of compensation validates and constitutionalizes the otherwise wrongful government action. (*City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 714-715 [1999] [Kennedy, J.]; *United States v. Clarke*, 445 U.S. 253, 257 [1980].)

[5] Justice Brandeis' opinion for the Court in *Hurley* shows his acceptance of the Court's holding in *Pennsylvania Coal* that takings require compensation. Justice Brandeis had been the lone dissenter in the latter case, expressing the belief (abandoned in *Hurley*) that valid regulation does not require compensation.

along the coast from Mexico to Oregon, and concluded:

> "The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it." (*Nollan*, 483 U.S. at 841-842.)[6]

And, of course, that concept is the underpinning for the Court's categorical rule that, if regulation denies all economically beneficial or productive use of private land, it is a *per se* taking — no matter how beneficial it may be. (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 [1992] [Scalia, J.].) That is why, under *Lucas*, a taking *always* occurs when economically productive use is prevented, "*without* case-specific inquiry into the public interest advanced in support of such

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[6] See also *Griggs v. Allegheny County*, 369 U.S. 84, 89-90 (1962) (Douglas, J.) [airport operator must pay for noise-impacted property beyond the ends of its runway].

a restraint." (*Lucas*, 505 U.S. at 1015; emphasis added.)[7]

In *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (O'Connor, J.), the Court held that states are free to engage in land reform if they so desire but, when private property is taken in the process for use by others, compensation is mandatory. *Midkiff*, of course, reaffirmed the Court's seminal opinion in *Berman v. Parker*, 348 U.S. 26, 36 (1954) (Douglas, J.), which upheld the propriety of urban redevelopment because "the rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."

Thus, for a taking to occur, it matters not whether the regulators acted in good or bad faith, or for good or bad reasons. What matters is the impact of their acts, not the purity *vel non* of their motives. Indeed, if their motives are benign — or done for the best of reasons —

[7] See also *Florida Rock*, 18 F.3d at 1571, n. 28, in which the Federal Circuit noted with understatement: "In *Lucas*, the South Carolina Supreme Court had held that the State's purpose in protecting oceanfront ecology excused the State from liability for its regulatory imposition. The Supreme Court held that was not the correct criterion for takings jurisprudence."

that only fortifies the need for compensation required by the Just Compensation Clause of the Fifth Amendment.[8]

Put still another way, the exercise of the power to govern — whether by eminent domain or by far-reaching regulations that *de facto* deprive the owners of their right to make productive use of their land or by exactions that seek to compel individual citizens to pay for public services or projects that are properly the burden of society at large — is not a tort. Nor is it *per se* wrongful — unless the government refuses to pay the just compensation required by the Constitution. That the District may prefer to foist the cost of wetlands protection onto the convenient citizen seeking a land use permit is not relevant. The general public, which benefits from such public action, must constitutionally bear the cost. (*Armstrong v. United States*, 364 U.S. 40, 49 [1960].)

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[8] See *Hughes v. Washington*, 389 U.S. 290, 298 (1967): "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." (Steward, J, concurring; emphasis original.)

II.

THE BURDEN LIES WITH THE GOVERNMENT TO DEMONSTRATE THE NEED FOR AN EXACTION; IT IS NOT THE PROPERTY OWNER'S BURDEN TO DISPROVE THE CONNECTION

The District has not understood the nature of its burden when seeking the exaction of property (either real estate or cash) as a condition to a land use permit. Rather, it has taken the position that the duty rests upon the property owner to disprove the applicability of the District's exaction. (See, e.g., BIO at 5.)

The District is wrong. In *Dolan*, this Court made clear where the burden lies: it lies with the government. The decision there plainly held that "*the city must make* some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (512 U.S. at 391; emphasis added.) The Court then concluded that the city's findings failed to "show the required reasonable relationship" between the exaction demanded as a condition to a building permit request and the impact of the proposed development on the city. (512 U.S. at 395.) Thus, the Court placed the burden squarely on the city to justify its regulation, and to make a determination as to

each property owner affected by a regulation that affected many properties. (*Dolan*, 512 U.S. at 391, n. 8.)

From a policy standpoint, the *Dolan* burden placement is good sense as well as good law. After all, the burden should always be on the party who wants to change the *status quo*. It was reasonable to place on Mr. Koontz, for example, the burden of proving that his property was properly suited to the proposed development. But it was the District that wanted to impose a severe condition on development in the form of demanding off-site "mitigation" work on property owned by the District. To justify that, it is proper for the District to bear the burden of proving the nexus under *Nollan* and rough proportionality under *Dolan* necessary to satisfy the Fifth Amendment.

As can be seen from the Florida Supreme Court's opinion and the District's briefing, it has become facile to say that the property owner would suffer no burden if not for the desire to make heavier use of the property, thus justifying virtually any exaction. But that has not been the law for many decades with regard to conditions in general, and at least since *Dollan* with respect to land use conditions. Indeed, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439, n. 17 (1982),

the Court dismissed as constitutionally unacceptable the idea that there would have been no taking had the property owner chosen not to use the land.

Similarly, in *Lucas* the Court, while remanding the case to the state courts for further action, ". . . emphasize[d] that to win its case, South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim . . . ." (505 U.S. at 1031; internal punctuation simplified.)

In other words, this Court's opinions have plainly placed the burden on the regulator to justify any preconditions to development. This Court evidently needs to say so again, and to make clear that it applies regardless of the kind of property — real estate or cash — that is demanded as *quid pro quo*.

III.

THE SKY WILL NOT FALL IF THE GOVERNMENT CANNOT COERCE CITIZENS TO PAY FOR PUBLIC IMPROVEMENTS FOR WHICH THEY DID NOT CREATE THE NEED

The District can also be expected to make some variant of the argument that neither it

nor other regulatory bodies will be able to fulfill their functions if they are hamstrung by the Fifth Amendment's protections of private property owners.

Such a "parade of horribles" is as unfounded here as it has proven in the past. In *First English*, for example, this Court finally decided (after several failed attempts to answer the question [see 482 U.S. at 311]) that when regulations have the effect of taking property, the Fifth Amendment requires compensation. Numerous governmental *amici curiae* urged the Court not to provide compensation, on the ground that it would be ruinous to government.[9] This Court was not moved. To

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[9] The Court's files in *First English* enshrine a variety of such arguments. For example, a large group of state *amici* said the church was seeking a "radical reformulation of takings jurisprudence" that would "cripple" regulators (pp. 1-2), risk "financial chaos," and have "a major chilling effect on the regulatory process" (p. 23). The State and Local Legal Center predicted that a ruling adverse to the government would "paralyze" public health and safety regulation, "threatening bankruptcy" for municipalities. (p. 3.) However, when this Court ruled against the government, life continued, and there have been no reports of municipal paralysis or bankruptcy related to the opinion.

the contrary, the Court understood that the Fifth Amendment mandated governmental restraint and/or payment:

> "We realize that even *our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations.* But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' [Citation.]" (*First English*, 482 U.S. at 321; emphasis added.)

In stark contrast to this Court's holding in *First English*, the Florida Supreme Court based its holding on the theory that it "is both necessary and logical" to *preserve* government's "authority and flexibility" so that land

regulation not "become prohibitively expensive." (Pet. App. at A-20-21.)[10]

Perhaps underlying that conclusion was this Court's repeated recognition that, when the governmental interest is financial (as in obtaining the uncompensated use of Mr. Koontz's labor and monetary resources for environmental improvements to District property), its actions must be viewed warily. (See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 [1977] [". . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money . . . ."]; *United States v. Winstar Corp.*, 518 U.S. 839, --- [1996] [". . . statutes tainted by a governmental object of self-relief . . . in which the Government

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[10] Not only does this directly contradict *First English*, the cases cited by the Florida court do not support its conclusion. *Warth v. Seldin*, 422 U.S. 490, 508, n. 18 (1975) does no more at the cited page than note that zoning is a matter of local concern. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 324 (2002) merely cautions against treating any land use regulation that affects land in any "tangential" way as a *per se* taking, something that is not related to the facts of this case. The impact here is direct and plainly in conflict with *Dolan*.

seeks to shift the costs of meeting its legitimate public responsibilities to private parties."]; *United States v. Good Real Property*, 510 U.S. 43, 55-56 [1993] [careful examination "is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding."].)

In *Nollan*, the Court warned government regulators not to attempt to evade the Constitution's strictures through inventive wordplay: "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." (483 U.S. at 841.) Particular care is needed when government conditions approval of a project on an actual conveyance of property ". . . since in that context there is heightened risk that the purpose is avoidance of the compensation requirement . . . ." (483 U.S. at 841.) The brief on the merits filed by Mr. Koontz amply shows that, from a Fifth Amendment perspective, there is no difference between real property and cash, so this brief will refrain from plowing that already tilled field.

Lucas is also instructive. Viewing a statute that contained numerous "legislative findings" to support its conclusion (see 505 U.S. at 1021, n. 10), this Court stressed that what is

important is *not* the voiced governmental rationale (because that would always justify the governmental act unless the government had "a stupid staff" [505 U.S. at 1025, n. 12]), but whether the underlying facts support the result.

On a policy level, Professor Michelman directly confronted the idea whether government ought to be able ethically to compel individuals to subsidize society as a whole, noting that:

> "any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all." (Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* [1967] 80 Harv. L. Rev. 1165, 1181].)

Michelman's classic article on ethics in just compensation law built, of course, on the Court's conclusion in *United States v. Cors*, 337 U.S. 325, 332 (1949) that, "[t]he political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." That bedrock concept needs to be kept in mind in cases like this where government seeks to commandeer private capital for public use.

In short, as the Court concluded in *Watson v. Memphis*, 373 U.S. 526, 537 (1963):

> "[V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."

CONCLUSION

For constitutional purposes, there is no distinction between the exaction of real property and the demand for money as a *quid pro quo* for issuance of a land use permit. In either case, the Fifth Amendment and this Court's application of it in *Nollan* and *Dolan* must control.

Respectfully submitted,

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APPENDIX OF *AMICI CURIAE* PARTIES

The National Association of Home Builders

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. About one-third of NAHB's 140,000 members are home builders and remodelers, and its builder members construct about 80% of the new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services.

The Real Estate Roundtable

The Real Estate Round Table represents the leadership of the nation's top privately owned and publicly held real estate ownership, development, lending, and management firms, as well as the elected leaders of the 17 major national real estate industry trade associations to jointly address key national policy issues related to real estate and the overall economy. Collectively, the Roundtable's members hold portfolios containing over 5 billion square feet of office, retail, and industrial properties valued at more than $1 trillion; over 1.5 million

apartment units; and in excess of 1.3 million hotel rooms.

American Farm Bureau Federation

AFBF is a not-for-profit, voluntary general farm organization incorporated in Illinois in 1919. It was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. The American Farm Bureau has member organizations in all 50 states and Puerto Rico, representing more than 6.2 million families.

Building Owners and Managers Association (BOMA) International

BOMA is a federation of 93 U.S. associations and 13 international affiliates. Founded in 1907, BOMA represents the owners and managers of all commercial property types, including 9.9 billion square feet of U.S. office space that supports 3.7 million jobs and contributes $205 billion to U.S. GDP. Its mission is to advance the interests of the commercial real estate industry through advocacy, education, research, standards and information.

California Building Industry Association

CBIA is a statewide non-profit trade association comprising approximately 3,000 members involved in the residential

development industry. CBIA and member companies directly employ tens of thousands of people in California and are responsible for the planning and construction of approximately 70% of all new homes each year. CBIA is a recognized voice of all aspects of the residential real estate industry in California.

Commercial Real Estate Development Association

NAIOP, the Commercial Real Estate Development Association, is the leading organization for developers, owners, and related professionals in office, industrial, and mixed-use real estate. NAIOP comprises 15,000 members in North America, with over 50 local chapters. NAIOP advances responsible commercial real estate development and advocates for effective public policy.

Florida Home Builders Association

FHBA is a not-for-profit Florida corporation, with more than 10,000 members statewide, aiming to "serve, advance and protect the welfare of the home building industry in such manner that adequate housing will be made available by private enterprise to all Americans." Affiliated with the National Association of Home Builders (NAHB) and 25 local/regional home builders associations around the state, FHBA enjoys a legacy of success spanning 65 years. At its core, FHBA is

about advocacy and its legislative, legal and political initiatives have worked together to create the best possible economic and regulatory environment for our members to succeed.

International Council of Shopping Centers

ICSC is a not-for-profit corporation organized under the Not-for-Profit Corporation Law of the State of Illinois. It is the global trade association of the shopping center industry with over 56,000 members worldwide, more than 47,000 in the United States and 3,963 in the State of Florida. Its members include developers, owners, retailers, lenders and others that have a professional interest in the shopping center industry. ICSC's members own and manage essentially all of the more than 10,239 shopping centers in the State of Florida. In 2011, these shopping centers accounted for $179.8 billion in shopping center combined sales. That same year, these shopping centers employed more than 782,500 individuals, constituting 10.8 percent of the total nonagricultural employment in the state, and contributed $10.8 billion in state sales tax revenue.

National Apartment Association

NAA is the leading national advocate for quality rental housing. NAA is a federation of

170 state and local affiliated associations, representing more than 55,000 members responsible for more than 6.2 million apartment units nationwide. NAA is the largest broad-based organization dedicated solely to rental housing. In addition to providing professional industry support and education services, NAA and its affiliated state and local associations advocate for fair governmental treatment of multi-family residential businesses nationwide.

National Association of Real Estate Investment Trusts®

NAREIT®, the National Association of Real Estate Investment Trusts®, is the worldwide representative voice for REITs and publicly traded real estate companies with an interest in U.S. real estate and capital markets. NAREIT's members are REITs and other businesses throughout the world that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.

National Association of Realtors®

NAR is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and

counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,400 local Associations of REALTORS®, and more than 1 million REALTOR® and REALTOR ASSOCIATE® members.

National Cattlemen's Beef Association

The National Cattlemen's Beef Association is the marketing organization and trade association for America's cattle farmers and ranchers. NCBA is a consumer-focused, producer-directed organization representing the largest segment of the nation's food and fiber industry and represents tens of thousands of America's farmers, ranchers, and cattlemen who provide much of the nation's food supply. Its members are proud of their tradition as stewards and conservators of America's land, and good neighbors to their communities.

National Mining Association

NMA is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its members include manufacturers of mining and mineral processing machinery

and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries, as well. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources.

National Multi Housing Council

NMHC, based in Washington, DC, is a national association representing the interests of the largest and most prominent apartment firms in the United States. NMHC's members are the principal officers of firms engaged in all aspects of the rental apartment industry, including ownership, development, management, and financing. NMHC advocates on behalf of rental housing, provides leadership on legislative and regulatory matters, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. One-third of American households rent, and over 14 percent of households live in a rental apartment (buildings with five or more units).

Public Lands Council

PLC, headquartered in Washington, D.C., represents ranchers who use public lands and

preserve the natural resources and unique heritage of the West. PLC is a Colorado non-profit corporation. PLC membership consists of state and national cattle, sheep and grasslands associations. PLC works to maintain a stable business environment for public land ranchers in the West where roughly half the land is federally owned and many operations have, for generations, depended on public lands for forage.

Chamber of Commerce of the United States of America

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

AMICUS CURIAE BRIEF

No. 11-1447

In The Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF *AMICUS CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

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QUESTIONS PRESENTED

1. Can the government be held liable for a taking when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)?

2. Does the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use?

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) submits this brief amicus curiae in support of Petitioner Coy A. Koontz, Jr.

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10

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[1] Counsels of record have consented to the filing of this brief. Petitioners and Respondents have filed blanket consents to all amicus filings with the Clerk of Court. Amicus has given the parties timely notice of our intention to file in this matter and have provided the parties with an electronic copy of this filing. In accordance with Rule 37.6, NFIB Legal Center states that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The NFIB Legal Center has filed in numerous other property rights cases in recent years, including *Arkansas Game & Fish Commission v. United States*, 11-597 (2012), *Stop the Beach Renourishment v. Florida*, 560 U.S. __ (2010), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). We seek to file here because small business owners are concerned that land-use authorities will predictably abuse their permitting powers if this decision should limit application of the nexus and rough proportionality tests established in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Specifically, small business owners are concerned that their property rights will be held hostage to extortionate *quid pro quo* demands unless *Nollan* and *Dolan* are held to apply in this case.

SUMMARY OF ARGUMENT

Coy A. Koontz, Sr. (Mr. Koontz),[2] was denied the right to use his property because he refused to capitulate to the government's *quid pro quo* demand that he surrender personal assets to improve public property. This was a condition that Respondent, St. Johns River Management District (St. Johns),

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[2] Coy Koontz, Sr., was Petitioner Coy Koontz, Jr.'s father. Today Mr. Koontz, Jr. represents the estate of Mr. Koontz, Sr.

insisted upon as a term of approving his building permit application for a commercial development. Despite the fact that the Florida courts determined that this condition was wholly unrelated to the mitigation of any adverse impact that his project would have on the public, the Florida Supreme Court held that there was no constitutional problem here.

But, Mr. Koontz was faced with an impossible ultimatum. He was forced to choose between (a) dedicating personal resources to improve public property or (b) foregoing the right to use his property. Neither choice was acceptable because his constitutionally protected rights were on the cutting block on either side of the equation. In the end, St. Johns followed through on its threat to kill Mr. Koontz's permit application because he was unwilling to sacrifice his personal assets.

In withholding approval of Mr. Koontz's permit for his refusal to submit to this condition, St. Johns violated *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Nollan* and *Dolan* provide that an imposed condition on a permit must bear an "essential nexus" and "rough proportionality" to some adverse public harm. If applied, that standard would hold St. Johns liable for a taking of Mr. Koontz's property because the Florida courts have already determined that the contested condition was unrelated to any impact his project would have on the public.

In defense, St. Johns contends that *Nollan* and *Dolan* do not apply where the government either

(1) denies a permit application or (2) imposes a condition requiring something other than the dedication of real property. But, St. Johns' theory must be rejected because it would allow land use authorities to predictably and systematically circumvent *Nollan* and *Dolan*. Indeed, if *Nollan* and *Dolan* only apply when a permit is approved, land use authorities will simply hold permit applications hostage until landowners give in to extortionate demands upfront. And if *Nollan* and *Dolan* only apply with regard to exactions seeking dedications of real property, the authorities will systematically demand exactions of personal property, or require the waiver of other rights, as the price of permit approval.

Moreover, as a doctrinal matter, *Nollan* and *Dolan* must apply in any case where the government seeks to leverage its position of authority in the permitting process—in an extortionate manner—so as to force a landowner into making inappropriate concessions. And it does not matter whether the government approves the permit subject to an extortionate demand or simply holds the permit hostage by making the demand a precondition of approval; the coercive effect is the same either way.

Here St. Johns sought to leverage its permitting powers so as to force Mr. Koontz into giving the public a benefit. But, this was a benefit that the government had no right to demand. St. Johns could not have directly forced Mr. Koontz to improve public property without either exercising the power of eminent domain—to take his personal assets—or violating the Constitution. And the only

way to justify such a demand under the permitting power would be to demonstrate that such conditions were necessary to mitigate reasonably anticipated harms to the public interest. Accordingly, St. Johns exceeded its permitting powers because it sought to require a condition that was unrelated to any impact Mr. Koontz's project would have on the public. As such, the contested condition must be viewed as an inappropriate *quid pro quo* demand—"an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837.

ARGUMENT

I. Limiting *Nollan* and *Dolan* Would Encourage Systematic Abuse of the State's Permitting Power

a. Regulators Will Predictably Play on the Landowner's Vulnerabilities

For a landowner, the process of acquiring necessary government approvals for a building permit can be almost maddening. What should be a relatively simple process often becomes an expensive, time-intensive and frustratingly slow affair.[3] The landowner must demonstrate that his or her plans are in conformance with layers and layers

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[3] In addition to paying for services from a licensed engineer, a permit applicant often needs to pay for costly environmental field studies, as well as advice from special consultants and or legal counsel. In this case, Mr. Koontz would have needed to obtain a wetlands permit from the Army Corp of Engineers—after appeasing the local and state authorities. J.A. 76. And, as of 2002, the average wetlands permit cost applicants more than $270,000. *See Rapanos v. United States*, 547 U.S. 715, 720 (2005).

of regulation at the federal, state and local levels. In this case, Mr. Koontz not only needed approval from St. Johns, but also needed additional approvals from local land-use authorities and the Army Corps of Engineers. J.A. 76.

Moreover, attaining a building permit is not as simple as checking the necessary boxes. This is so because land-use authorities are generally vested with wide discretion to make judgment calls as to whether a proposed project satisfies all zoning requirements. *See, e.g., Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 995 (2d Cir. 1997). This discretion is a good thing in so far as it promotes rational permitting decisions tailored toward addressing reasonably anticipated impacts. But, broad discretion also enables the authorities to hold permit applications in perpetual limbo as the State engages in a one-sided bargaining process. *See* Richard Epstein, *The Harms and Benefits of Nollan and Dolan*, 15 N. Ill. U. L. Rev. 479, 483 (1995) (analogizing the government's power of refusal to that of a dockmaster who might abuse his or her bargaining power, if allowed to take advantage of a crew's "abject necessity," by denying a vessel the right to port during a storm, unless the crew is willing to surrender all they own).

The authorities often threaten denial in order to coerce the landowner into repeatedly proposing less ambitious building plans. *See, e.g.*, California Coastal Comm'n Public Meeting, Agenda Item Th 13c-h, Presentation of Don Schmitz 3:09:53-3:42:16 (recounting the history of a permit application in which development plans were

"completely redesigned," in good faith and at great expense, multiple times to appease the authorities: "[W]hen I came back and told [my clients] that they would have to spend another $100,000 [for a third redesign], this was not well received.") (June 16, 2011).[4] And regulators do so with the assurance that they will not likely incur takings liability unless they go so far as to make a definitive final decision to impose restrictions denying the owner of all economically beneficial uses of the property.[5] *See Williamson County v. Hamilton County Bank of Johnson City*, 473 U.S. 172, 186 (1985). As a result, the land-use permitting process often degenerates into a seemingly endless procedural merry-go-round. William M. Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After Palazzolo v. Rhode Island*, 46 St. Louis U. L.J. 833, 833-34 (2002).

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[4] *Available at* http://www.cal-span.org/cgibin/media.pl?folder=CCC (last visited Nov. 9, 2012); *see also* Martha Groves and Tony Barboza, *Coastal Commission Rejects U2 Guitarist's Malibu Development Plan*, Los Angeles Times (June 17, 2011) (noting that the Coastal Commission went on to deny this permit application).

[5] Outside of the land-use permitting context, unless a restriction denies the owner the right to make all economically beneficial uses of his or her property, takings claims are reviewed under the amorphous balancing test established in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 528-29 (2005). But, landowners are not likely to prevail under *Penn Central*, regardless of how severe the restrictions may be. *See e.g., CCA Assoc. v. U.S.*, 667 F.3d 1239, 1248-49 (Fed. Cir. 2011) (no taking where a regulation forced landowner to house families at a loss of 81.25 percent of return on equity).

It is commonplace for the authorities to delay permitting decisions indefinitely as various proposals are considered and modified.[6] During this time the landowner is unable to make any use of his or her property. This can be frustrating for any landowner because one's hopes and dreams are placed on hold during the pendency of a permit application. For Mr. Koontz it must have been all the more frustrating in light of the fact that the area around his property was already largely developed and because the surrounding properties would soon become more developed.[7] Pet. Cert. App. D-4; *see also* J.A. 101-02, 111-19, 137-39 (describing conditions in project area).

With every delay, landowners become more and more exasperated. The sense of urgency is even greater for individuals of modest means, who have tied up much of their personal assets into their property. For a small business owner or a developer, delays are all the more difficult to bear because their livelihood is at stake. A developer or small business cannot afford to stall a project for too long because

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[6] It is also common for the authorities to force landowners to offer successive proposals by repeatedly denying permit applications. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 613-16 (2001); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 698 (1999) ("After five years, five formal decisions, and 19 different site plans, [] Del Monte Dunes decided the city would not permit development of the property under any circumstances.") (internal citations omitted).

[7] Today, his property is surrounded on three of four sides by other commercial developments. J.A. 76. This reality makes it all the more apparent that his permit was not withheld for any legitimate reason, but rather because he refused to "pay-to-play."

there can be no return on a real estate investment while the property remains undeveloped. P.J. Keane & A.F. Caletka, Delay Analysis in Construction Contracts, Wiley-Blackwell, 2 (Blackwell Publishing, 2008) ("The most significant unanticipated cost in most construction projects is the financial impact associated with delay and disruption to the works.").[8] Indeed, this was the case here; Mr. Koontz could not sell his property, or recoup his investment, without permit approval. J.A. 29-30, 35, 101, 105. Accordingly, it might have made sense, in a pure economic calculus, to assent to St. Johns' unconstitutional demands—even if it would have been costly.

Yet, a landowner should not have to pay off the authorities in order to exercise his or her constitutional rights, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987), and, the authorities should not be able to play upon an individual's vulnerabilities in this manner.[9] But unfortunately, there will always be a risk of inappropriate coercion so long as regulators know that they hold an absolute power of refusal—like a Damoclean Sword hanging over the

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[8] *Available at* http://books.google.com/books?id=uxHXn8CctmgC&pg=PA2&dq=The+most+significant+unanticipated+cost+in+most+construction+projects+is&hl=en&sa=X&ei=dQS1UPTqGcHo0gHvsoCwBA&ved=0CEEQ6AEwAg#v=onepage&q=The%20most%20significant%20unanticipated%20cost%20in%20most%20construction%20projects%20is&f=false (last visited Nov. 27, 2012).

[9] While it may be common practice to pay for government approvals in other countries, such corrupt practices cannot be tolerated in our constitutional system. *Nollan*, 483 U.S. at 837.

landowner's head.[10] But, government should not be allowed to abuse its powers in this manner. Epstein, *supra* at 15 N. Ill. U. L. Rev. at 483 (government should not be able to take advantage of an individual's "abject necessity").

b. Land-Use Authorities Will Effectively Nullify *Nollan* and *Dolan* by Predictably Requiring Waiver as a Precondition of Approval

Nollan and *Dolan* held that land-use authorities cannot play upon an individual's vulnerabilities by insisting on conditions that bear no nexus to anticipated harms from a proposed project. *Nollan*, 483 U.S. at 837; *Dolan v. City of Tigard*, 512 U.S. 373, 390-91 (1994). But here St. Johns argues that *Nollan* and *Dolan* should have no application because Mr. Koontz's permit was never approved. This theory presumes an exception to *Nollan* and *Dolan*—an exception that would swallow the rule.

If St. Johns' argument is accepted, the protection that *Nollan* and *Dolan* offered to property owners will be rendered impotent. *See* J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan & Dolan and Where They Should Go From Here*, 59 WLLR 373, 408 (2002) ("The essential nexus test cannot survive long when riddled with [] loopholes.").

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[10] For this reason, the authorities also have a perverse incentive to push for more stringent zoning restrictions than are truly necessary. *Nollan*, 483 U.S. at 837 n. 5.

This is necessarily so because—in preconditioning permit approval on the waiver of property rights—the authorities may accomplish the same end as if they had approved the permit subject to the same conditions. Indeed, under St. Johns' theory the California Coastal Commission could have required dedication of an easement across the Nollan family's property without incurring takings liability by simply making dedication a *precondition* of approval.[11] But, that scheme would have been no less extortionate. *See Lambert v. City and County of San Francisco*, 529 U.S. at 1047-48 (2000) (Scalia, J., dissenting).

Accordingly, this formalistic exception must be rejected because it would allow land-use authorities to predictably and systematically circumvent *Nollan* and *Dolan* simply by requiring waiver of constitutional rights up-front. Indeed, some local authorities have already tried this approach. For example, in *Powell v. Humboldt County*, the County of Humboldt, California forced the Powell family into a catch-22, requiring the family to acquire an after-the-fact permit for their front porch while refusing to process their permit until they capitulated to a demand for an aviation easement over their property. *See* Ryan Burns, *Unexpected* Turbulence, The North Coast Journal

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[11] But, even there, the permit would not issue unless the owner capitulated to the extortionate condition. *See Nollan*, 483 U.S. at 828 ("[T]he Commission overruled their objections and granted the permit *subject to a deed restriction*...") (emphasis added).

(Jan. 27, 2012).[12] The County simply refused to either approve or deny their permit application because the Powells refused to waive their property rights.[13]

The same could be done with any permit application under St. Johns' theory. The authorities could hold the landowner in perpetual limbo until he or she capitulates to an extortionate demand. Alternatively, the authorities could evade liability by denying permit applications outright. Either way, the owner would be perpetually denied the right to make reasonable use of the land, unless he or she submitted to the government's demands. To avoid this predictable fall out, *Nollan* and *Dolan* should apply broadly to deter—as a prophylactic matter—improper coercion. *See* Breemer, *supra* 59 WLLR at 408 ("Without a strong essential nexus test, individuals often will be forced to bear burdens that properly should be borne by the public as a whole."). This would send a clear message that the state cannot take advantage of the individual's vulnerabilities by holding a permit hostage. *Id.*

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[12] *Available at* http://www.northcoastjournal.com/news/2011/01/27/unexpected-turbulence/2/ (last visited Nov. 27, 2012).

[13] *Powell v. County of Humboldt*, Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, No. DR110033 (Jan. 11, 2011), *available at* http://www.pacificlegal.org/document.doc?id=509 (last visited Nov. 11, 2012) ("The County is holding the Powell's permit hostage until they provide the County an overflight easement").

c. If *Nollan* and *Dolan* Are Limited to Apply Only to Dedications of Real Property, Regulators Will Predictability Extort Waiver of Other Rights

If *Nollan* and *Dolan* are interpreted narrowly to apply only where the authorities demand dedication of real property, this Court would be giving the authorities license to impose any other condition they should like. *Id.* To be sure, government will predictably push its permitting powers to the outer-limit. *See, e.g, McAllister v. Cal. Coastal Comm'n*, 169 Cal. App. 4th 912, 939 (2008) (noting that, in environmentally sensitive areas, the California Coastal Commission may be required to prohibit all development, except to the extent a permit denial would constitute a taking). And without any requirement to demonstrate a nexus—regardless of how coercive the exaction demand might be or what rights might be at issue—there would be virtually nothing stopping the authorities from abusing their power of refusal.[14]

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[14] It is difficult to fathom how a landowner could ever prevail in asserting that an imposed condition lacks any rational basis if the landowner cannot prevail by demonstrating that the condition has been imposed without regard to any impact the project will have on the public interest. And, if *Nollan* and *Dolan* do not apply, a takings claim would likewise—almost assuredly—fail under the Penn Central test. *See, e.g., McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008).

II. Any Condition Unrelated to the Goal of Mitigating Anticipated Public Harms is an Unconstitutional Extortionate Demand

a. At Common Law Landowners Are Presumed Free to Use Their Property

It is axiomatic that the right to own a property is coextensive with the right to make reasonable use of the property, and to do so at the exclusion of the rest of the world. *See* 1 EDWARD COKE, THE INSTITUTES OF LAWS OF ENGLAND, ch. 1 sec. 1 (1797) (1st Am. Ed. 1812) ("What is the land but the profit thereof?"); *see also Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37, 39 (N.Y. App. Div. 1932) ("As a general rule, an owner is at liberty to use his property as he sees fit, without objection or interference from his neighbor, provided such use does not violate an ordinance or statute."). This has always been the rule at common law. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 513 (1977) (Stevens J., concurring) ("Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property."). As William Blackstone explained, the right of property is an "absolute right, inherent in every Englishman... which consists in the free use, enjoyment, and disposal of all his acquisitions, *without any control or diminution* save only by the laws of the land." 1 Bl. Comm. The Rights of Persons Ehrlich Ed. P. 41 (emphasis added).

The common law presumption holds that a landowner is at liberty to make any reasonable use of his or her property. *Bailey v. United States*, 78 Fed. Cl. 239, 271 (2007) ("[B]oth [the *Nollan* and *Palazzolo*] opinions underscore the right of owners to make reasonable use of their property, and to pass this same right of use to successors.") (citing *Nollan*, 483 U.S. at 834 n. 2; *Palazzolo*, 533 U.S. at 627). The right to freely use one's property is subject only to appropriately imposed prohibitions under positive law and the duty to refrain from activities that might cause harm to others. *See* Steven J. Eagle, Regulatory Takings, § 2-1 (3d ed. 2005) ("The police power in Anglo-American law can be traced back to Glanville's admonition in 1187 that a person may not use his or her property to the detriment of another.") (citing David A. Thomas, Thompson on Real Property Sec. 72.02 (1994)). Yet the modern trend has been to deemphasize the landowner's right to freely exercise dominion over his or her property. *Penn Cent.*, 483 U.S. at 124 (noting that takings liability is less likely to arise when a challenged restriction merely "adjust[s] the benefits and burdens of economic life").

Today, land-use authorities all across the country seek to abrogate the common law presumption—of free and unrestrained use—by subjugating the owner's rights to the demands of increasingly severe zoning and permitting regimes. *See, e.g.*, It's Hard to Get House Project OK: Standards for Zoning Variances Have Gotten Stricter All Over the State, Wis. St. J., Ass. Press

(Aug. 27, 2001).[15] In doing so, they turn the very concept of property rights on its head, such that the right to use one's property is often held hostage, and mischaracterized as a mere privilege or discretionary benefit. *See Nollan*, 483 U.S. at 833 n. 2 (rebuffing the suggestion that "the right to build on one's own property" may be considered a "governmental benefit"). But that does not change the reality that land-use restrictions negate constitutionally protected common law property rights. *Id.*

Under common law principles, a landowner can develop a property in whatever manner the owner should like, so long as the owner's use does not constitute a nuisance to his or her neighbors or the community at large. Keith H. Hirokawa, *Property as Capture and Care*, 74 Alb. L. Rev. 175, 198 (2010-2011). Authorities might impose land-use restrictions to abrogate his or her right to develop in certain ways; however, the owner's property rights are constitutionally protected, such that the landowner cannot be denied the right to develop without a legitimate reason. *See Lingle*, 544 U.S. at 541 ("[A] municipal zoning ordinance would survive a substantial due process challenge so long as it was not 'clearly arbitrary and unreasonable, having *no substantial relation* to the public health, safety, morals or general welfare.'") (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)) (emphasis added). And while any given restriction might be deemed a legitimate exercises of the state's police

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[15] *Available at* http://www.highbeam.com/doc/1G177603189.html (last visited Nov. 8, 2012) (noting that Wisconsin homeowners are finding it increasingly difficult to attain permit approvals).

powers, under the near-toothless rational basis test, government cannot go *too far* in abrogating the common law right to use one's property without incurring an obligation to pay for what it is taking. *Lingle*, 544 U.S. at 537-538 ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.") (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)); *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960 ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

b. The State's Permitting Power is Limited to the Reasonable Mitigation of Affirmative Harms

i. A Legitimate Condition Must Have a Nexus to Reasonably Anticipated Public Harms

The state's permitting power is derived from its police powers, which allows government to impose restrictions in order to prevent reasonably anticipated harms to the public. *See Nollan*, 483 U.S. at 836. For example, a city council might adopt zoning restrictions with an aim to ensure that a development will not adversely affect public safety. A land-use authority, charged with the duty of administering and enforcing this zoning code, might legitimately impose any number of conditions on the grant of a development permit—so long as the

conditions bear a nexus and are roughly proportional to anticipated threats to public safety. *Dolan*, 512 U.S. at 387, 391. The authorities might legitimately condition a building permit on the requirement that the proposed project be modified to prevent fires. *Id.* The authorities might also impose conditions to minimize the risk of accidents resulting from increased traffic to and from the development site, or to avoid any other threat to public safety. *Id.*

As such, *Nollan* held that there must be a nexus between an imposed condition and some anticipated public harm. *Nollan*, 483 U.S. at 837. And *Dolan* clarified that the condition must be roughly proportional, specifically tailored to mitigate anticipated harms from a project. *Dolan*, 512 U.S. at 391. This rationale makes sense because a condition unrelated to the mitigation of a specifically anticipated public harm necessarily goes beyond the scope of those legitimate limitations authorized under the police powers. *See Village of Euclid*, 272 U.S. at 387-88 (reaffirming the common law origins of the police powers in the law of nuisance); Regulatory Takings § 2-1 ("The police power... preserve[s] the public order and prevent[s] offenses against the state... [and is] calculated to prevent [the] conflict of rights...") (citing THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 572 (1868)).

ii. An Imposed Condition Must Mitigate Public Harms That Might Justify an Outright Denial of the Permit

While it may be true that a permit application will be denied outright if the proposed project would violate a legitimately enacted zoning code, that does not give the authorities free rein to impose conditions unrelated to mitigating public harms. *See Village of Euclid*, 272 U.S. at 387-88 ("[T]he question [of] whether the power exists to forbid the erection of a building of a particular kind or for a particular use... is to be determined... by considering [the project] in connection with the circumstances and the locality."). If a project does not conform to the demands of the zoning code, the authorities may legitimately prompt the landowner to tweak the development plans to mitigate anticipated public harms. But if the authorities threaten to deny a permit on the ground that it does not satisfy aesthetic demands or health and safety standards, the authorities can only legitimately impose conditions relating to those concerns. *See Lingle*, 544 U.S. at 547 (The issue in *Nollan* and *Dolan* was "whether the exactions substantially advanced the same interests that land-use authorities asserted would allow them to deny the permit altogether."). Accordingly, a condition unrelated to the mitigation of public harms exceeds the scope of legitimate government action. *See Nollan*, 483 U.S. at 836 (A permit condition must serve "the same legitimate police-power purpose as a refusal to issue the permit...").

In *Nollan*, the California Coastal Commission sought to justify its condition, requiring a lateral easement across the Nollan family's property, on the ground that their home—once constructed—would create a psychological barrier, which might inhibit the public from exercising their right to access the beach. *Nollan*, 483 U.S. at 835-36. The Court acknowledged that such concerns might justify certain restrictions on the manner in which the property may be used. *Id.* But, the Commission could only impose conditions that would mitigate harms that might justify denial outright. *See Lingle*, 544 U.S. at 547-48. As such, concerns over a "psychological barrier" could not be invoked to justify a requirement that the Nollan's dedicate an easement to the public because that condition was completely unrelated to the asserted concern over the project's impact on the public-psyche. *Nollan*, 483 U.S. at 838-39.

Likewise, *Dolan* held that the City of Tigard, Oregon could legitimately impose certain conditions on the grant of a permit, but only those reasonably tailored to mitigate anticipated public harms. *Dolan*, 512 U.S. at 391. There a small business owner sought to expand her store and to enlarge her parking lot. *Id.* at 379. Since she was proposing a project that would likely result in greater storm-water runoff into nearby streams, it was reasonable to impose certain conditions tailored toward mitigating the impact her development would have on the watershed and the public water-control infrastructure. *Id.* at 392-93. Similarly, the authorities could justify certain conditions aimed at mitigating her project's impact on the city's

transportation systems because, by enlarging her parking lot, she would likely be contributing to vehicular traffic in the area. *Id.* at 395. But the City could not go 'too far'—in the name of addressing these concerns—without raising constitutional problems. *Id.*

The Court recognized that the state's permitting powers derived from its police powers. *Id.* at 387 ("regulatory authority" must be tied to its "constitutional moorings"). Accordingly, the Court held that an imposed condition is only legitimate if proportional to the anticipated public impact of the project. *Id.* at 395. The Court struck down conditions requiring the business owner to dedicate portions of her property to the public because those requirements exceeded those necessary to mitigate the public concerns. *Id.* at 391

c. A Condition Imposed for Any Purpose Other than Mitigation is an Extortionate Taking

Nollan recognized that a condition—unrelated to mitigation—is an "out-and-out plan of extortion." *Nollan*, 483 U.S. at 837. Indeed, a condition serving no legitimate state interest in mitigating public harms cannot be justified under the circumstances. *Dolan*, 512 U.S. at 387. Such a condition simply holds the landowner's property rights hostage by threatening to kill a permit application unless the landowner capitulates to inappropriate demands. *Nollan*, 483 U.S. at 837 (a condition, requiring the forfeiture of a property interest, serves no purpose other than obtaining something "without payment of

compensation" to the extent it bears no relationship to any public harm).

Though *Nollan* and *Dolan* dealt specifically with conditions aimed at exacting dedications of real property for public use, both cases rely upon a singular rationale that applies with equal force to any inappropriate *quid pro quo* demand. *See Nollan*, 483 U.S. at 837 (stating that California could legitimately prohibit the public from shouting fire in a crowded theater, but that the *Nollan* rationale would prohibit the state from conditioning waivers from that rule on the requirement that individuals pay a $100 tax contribution, because "adding the unrelated condition alters the purpose to one which, while it may legitimate, is inadequate to sustain the ban."). Whether the authorities demand the dedication of real property, forfeiture of personal property, or the waiver of any other protected property right, they seek to force the landowner to give up something—presumably for the public benefit—in exchange for allowing the free exercise of his or her property rights. In any such case, the authorities seek to exact something for which they had no right to take. *See United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (government must pay for the taking of any property interest); *see also Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003).

The key to *Nollan* and *Dolan* is that the regulators in both cases sought to acquire an interest in the subject properties by forcing the landowners into a catch-22. The owners were forced into the impossible situation of choosing between exercising

their property rights and submitting to an uncompensated demand for dedication of an interest in their properties. *See Nollan*, 483 U.S. at 831. Either way, a constitutionally protected property right was on the cutting block. *Id.* at 833 n. 2.

A landowner in this situation may hold title to the land in fee simple absolute, but if the owner capitulates to the government's *quid pro quo* demands, he or she surrenders an interest in the property to public. *See General Motors*, 323 U.S. at 378. The result is that the owner's estate has been burdened by a dominant servitude. *See Smith v. Town of Mendon*, 4 N.Y.3d 1, 19-20, 822 N.E.2d 1214, 122 (N.Y. 2004) (Reed J., dissenting) (a condition requiring preservation of open space compels dedication of a "conservation easement"). This is necessarily the case because the owner would no longer maintain complete and exclusive dominion over the property. *See General Motors*, 323 U.S. at 378.

In *Nollan* and *Dolan* the regulators sought to acquire an easement for the public to traverse across the subject properties. *Lingle*, 544 U.S. at 546. This would have unquestionably required just compensation under the Takings Clause if taken out right. *Nollan*, 483 U.S. at 831. But compensation would also have been required if the government had sought to formally appropriate a negative servitude to explicitly take away the owner's right to use the property in a given manner. *See* Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. Davis L. Rev. 1897, 1945

(2008) (a condemning authority must separately condemn conservation easements). This is true because the government would be asserting a dominant interest in the subject property—an interest paramount to the owner's interest in using the property as he or she might prefer. *Town of Mendon*, 4 N.Y.3d at 19-20, 822 N.E.2d at 122 (Reed J., dissenting). Indeed, in the absence of a legitimate state interest in imposing restrictions to limit the owner's right of free use and dominion over the property, no abrogation of common law property rights can be justified. *See Nollan*, 483 U.S. at 831. If permissible at all, such abrogation would require an exercise of eminent domain powers, which would require just compensation. *Id.* at 837.

The same is true here where the demanded exaction requires the forfeiture of personal property. If the state had simply sought to appropriate Mr. Koontz's personal assets out right, this would have undoubtedly constituted a taking requiring compensation. *Brown*, 538 U.S. at 235. Though St. Johns could legitimately impose conditions, which might require the expenditure of money if those conditions were roughly proportional to anticipated public harms, the lower courts have already determined that there was no connection between the contested condition and any impact the project would have on the public. *St. Johns River Water Management Dist. v. Koontz*, 5 So.3d 8, 10 (Fla. App. 5th Dist. 2009). In this light, the demanded condition is indefensible. The condition requiring the forfeiture of personal property must be viewed as an extortionate attempt to exercise the state's eminent

domain powers without paying compensation. *Id.* at 837.

d. St. Johns Violated *Nollan* and *Dolan* in Making an Extortionate *Quid Pro Quo* Demand and Carrying-Out its Threat of Denial

i. In Denying Mr. Koontz's Permit for his Refusal to Capitulate to an Extortionate Demand, St. Johns Violated *Nollan* and *Dolan*

The Florida Supreme Court held that *Nollan* and *Dolan* have no application where a permit is denied. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1231 (Fla. 2011). But, this completely misunderstands the state's permitting power. As explained above, conditions on the grant of a permit may only—legitimately—be imposed for the purpose of mitigating public harms because the permitting power can only address those harms that would justify denial outright. *Lingle*, 544 U.S. at 547. Accordingly, any condition imposed for a different reason is simply extortionate. *Nollan*, 483 U.S. at 837.

In this case St. Johns made an inappropriate *quid pro quo* demand of Mr. Koontz. *See Nollan*, 483 U.S. at 837. He was told that in order to receive permit approval—to exercise his common law right to use his own property—he would have to give the government something in return. *Koontz*, 77 So.3d at 1224. Specifically, he was told that he would have to

improve public property—at his own expense. *Id.* When he refused to accept that condition, the government carried out its threat to kill his permit application. *Id.* But, this denial was in itself an illegitimate state action because it was predicated upon Mr. Koontz's refusal to waive his rights in capitulation to an indefensible condition. *See* Regulatory Takings § 7-10(f)(1).

ii. St. Johns Cannot Immunize itself from Liability for its Wrongdoing

St. Johns argues that it has immunized itself from takings liability by denying Mr. Koontz's permit—despite the fact that it was denied because of his refusal to give in to inappropriate *quid pro quo* demands. Under this theory, takings liability only attaches if a permit is approved with extortionate conditions; however, for the purposes of *Nollan* and *Dolan*, it does not matter how precisely such conditions are imposed. *See Lambert*, 529 U.S. at 1047-48 (Scalia, J., dissenting). A violation occurred at the point in which the authorities made clear that Mr. Koontz could not enjoy his right to use his property as he planned without giving up compensation for the taking of a protected property interest in return. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 625 (Tex. 2004); *Salt Lake County v. Bd. of Educ. Granite Sch. Dist.*, 808 P.2d 1056, 1058 (Utah 1991) (defining an exaction as any "condition precedent" to development).

It does not matter whether the contested condition was affirmatively imposed on an approved permit or made to be a precondition of approval. Such a superficial distinction cannot immunize St. Johns from liability here because the coercive effect of an extortionate demand is the same regardless of how it is imposed. *See Nollan*, 483 U.S. at 841 (The Takings Clause is "more than a pleading requirement, and compliance with it... [is] more than an exercise in cleverness..."); *see also Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177-78 (1871) (applying a takings analysis despite formalistic problems with the pleadings). Either way the owner's property rights are held hostage. *Another Look at Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144, 154 (1968) (The unconstitutional doctrine is most applicable where government threatens denial of "benefits... [for which the] individual is reluctant to forego..."). And the fact that the authorities carried through on their threats to kill Mr. Koontz's permit application should not relieve St. Johns of liability. *See* Regulatory Takings § 7-10(f)(1). ("Denials ... may be equally without justification [as the contested condition], and [denials] buttress demands for excessive exactions by demonstrating... that refusals to cooperate [will] be punished.").

In no area of the law can the wrongdoer unilaterally evade liability for his or her wrongdoings by taking a retaliatory action against an uncooperative victim. *See generally Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 165, 133 N.E. 432, 433 (1921) (Cardozo, J.) ("[N]o one shall be permitted to take advantage of his own wrong ...").

But, that is exactly what St. Johns wants here. In suggesting that government should be able to evade *Nollan* and *Dolan* by imposing extortionate requirements as a *precondition* of approval—and then denying permit applications where the owner refuses to capitulate—St. Johns is asking this court to bless its retaliatory denial.

CONCLUSION

For the foregoing reasons, the *Nollan* and *Dolan* tests should apply in this case, and the Florida Supreme Court should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-1447

IN THE

Supreme Court of the United States

COY A. KOONTZ, JR.,
Petitioner

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

AMICI CURIAE BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE* [1]

Amici are national organizations whose members include state, county, and local governments and officials throughout the United States.

SUMMARY OF ARGUMENT

Petitioner's proposal to extend the *Nollan/Dolan* standards where government has denied a permit application and imposed no exaction is illogical, unworkable, and unnecessary. It is illogical because the *Nollan/Dolan* standards are designed to address whether government has taken private property by attaching a specific condition to its approval of a permit application. Where an application has been rejected and no exaction has been imposed, no private property has been taken within the meaning of the Takings Clause. In addition, petitioner's proposal to apply *Nollan* and *Dolan* to permit denials would effectively revive the "substantially advances" takings theory recently repudiated by the Court in *Lingle v. Chevron U.S.A., Inc.* Petitioner's proposal to extend *Nollan* and *Dolan* is unworkable because it would compel courts to attempt to make highly speculative determinations about numerous, ill-defined potential conditions that may have been considered but were ultimately not adopted. And the proposal is unnecessary because the Due Process Clause provides the natural constitutional remedy for a permit denial allegedly based on the government's

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amicus* made a monetary contribution to its preparation (Rule 37.6).

unreasonable refusal to come to an agreement with an applicant on permit conditions.

Petitioner's proposal to extend *Nollan* and *Dolan* to permit conditions involving mandates to pay money also should be rejected because it exceeds the logical bounds of this special doctrine. *Nollan* and *Dolan* only apply to permit conditions which, if imposed directly and outside of any permitting process, would constitute takings. In *Eastern Enterprises v. Apfel*, a majority of the Court recognized that a government-imposed mandate to pay money, such as taxes, cannot support a claim under the Takings Clause. Sound reasons based on the text, history, and purpose of the Takings Clause justify reaffirming this conclusion. Because a government mandate to pay money cannot constitute a taking, it follows that *Nollan* and *Dolan* cannot be expanded to encompass permit conditions involving money.

The Court should not cast aside its usual deferential approach in constitutional challenges to economic and social regulation by extending the special *Nollan/Dolan* standards beyond their natural domain. Expanding them as petitioner proposes would impose significant new administrative and litigation costs on local governments and undermine their ability to perform their responsibilities. Developers such as petitioner have a natural economic incentive to attempt to reap the benefits of public infrastructure investments without paying for them and to transfer the costs associated with their developments to the general taxpayers or the community as a whole. But for sound practical and constitutional reasons, outside the special context of exactions governed by *Nollan* and *Dolan*, established doctrine calls for deference to the judgments of elected officials and

expert agencies about how such benefits and costs should be defined and allocated. The Court should reject this invitation to jettison the traditional approach.

ARGUMENT

I. Petitioner's Proposal to Extend the *Nollan/Dolan* Standards to Denials of Development Applications is Illogical, Unworkable, and Unnecessary.

The *Nollan* and *Dolan* cases involve government decisions *approving* the issuance of development permits subject to conditions requiring the applicants to *dedicate* explicitly-identified property interests to the public. In that context, the Court held government can attach such "exactions" to permit approvals only if they meet the relatively strict "essential nexus" and "rough proportionality" standards. The first question posed by this case is whether the Court should extend the *Nollan / Dolan* standards where government officials discussed issuing a permit subject to numerous alternative conditions but, in the face of land owner objections to any conditions, decided to reject the application as submitted instead. *Amici* respectfully submit the answer to this question should be an unequivocal "no."

Legal Doctrine. In general, evaluation of a takings claim involves a two-step inquiry: first, whether the claimant owns "property" and, second, whether the property has been "taken." The Takings Clause itself places some sideboards on what can qualify as property, *see Eastern Enterprises v. Apfel*, 524 U.S. 498, 540-41 (1998) (Kennedy, J., concurring in judgment and dissenting in part), but property interests themselves "are created and their dimensions defined

by existing rules or understandings that stem from an independent source such as state law." *Webbs Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980). If a claimant asserts an interest that does not qualify as property within the meaning of the Takings Clause, or if an asserted property interest is limited by "background principles" of law, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026-27 (1992), the takings claim will fail at the threshold.

The Court has identified "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005): first, where the government has subjected an owner to a "permanent physical occupation," typified by the case of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and second, where a regulation deprives an owner of "all economically beneficial use" of a fee interest in real property. *See Lucas*, 505 U.S. at 1017. "Outside of these two relatively narrow categories," *Lingle*, 544 U.S. at 538, regulatory takings cases are governed by the multifactor framework established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which calls for consideration of the economic impact of the government action, the degree of interference with investment-backed expectations, and the character of the action. *Id.* at 124.

For several decades the Court's opinions had suggested a regulatory taking also could be established by demonstrating a regulation "does not substantially advance legitimate state interests." However, in *Lingle* the Court stated that this "formula is not a valid takings test" and "has no proper place in our

takings jurisprudence." 544 U.S. at 548. Instead, the Court concluded, this formula raises an issue about the validity of government action properly addressed under the Due Process Clause. *Id.* at 540-42; *see also id.* at 548 (Kennedy, J., concurring) (observing "that a regulation might be so arbitrary or irrational as to violate due process").

In the narrow, "special context of exactions," *Lingle*, 544 U.S. at 547, the Court used buildings blocks provided by its prior takings decisions to construct the *Nollan/Dolan* standards. On the one hand, the Court recognized that, had the government unilaterally imposed the exactions at issue in those cases, the result would have been a taking under *Loretto*. *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). On the other hand, the Court also recognized it made no sense to conclude that such exactions attached to grants of regulatory approval necessarily resulted in takings. After all, if the government had simply rejected the applications (presumably to the owners' *greater* disadvantage), either the relatively less demanding *Penn Central* framework or the *Lucas* test would have applied to takings claims based on those decisions. *Nollan*, 483 U.S. at 835-36; *Dolan*, 512 U.S. at 834-35.

Based on these premises, the Court developed the "essential nexus" and "rough proportionality" tests to identify exactions that bear no logical relationship to the projected effects of the development at issue and, therefore, should constitute takings that cannot be imposed absent payment of just compensation. Under *Nollan*, an exaction will be deemed a taking if there is a lack of an "essential nexus" between the exaction and the government's regulatory interest in

the use of the property. Under *Dolan*, even if the essential nexus test is satisfied, an exaction will be deemed a taking if there is no "rough proportionality" between the burden placed on the owner by the exaction and the projected impacts of the proposed development. The Court has described these tests as involving an intermediate level of judicial scrutiny, under which government defendants bear the burden of demonstrating that exactions do not constitute takings. *See Dolan,* 512 U.S. at 391 & n.8.

The *Nollan/Dolan* standards cannot logically be extended to the situation where the government has *rejected* a development application and imposed *no exaction*. This step would extend the *Nollan/Dolan* standards beyond the "special context" for which they were developed. The nexus and proportionality standards resolve whether an actual exaction, imposed as a condition of a regulatory approval, constitutes a taking of the specifically identifiable property interest that has been exacted. If the exaction amounts to a taking, the government can only enforce it if it is willing to pay "just compensation." *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (observing the Takings Clause "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking").

If government officials have not actually imposed an exaction, however, no exacted property interest supports a claim of a taking of "property" under the *Nollan/Dolan* framework. Put simply, if the government has imposed no exaction, it has not taken any relevant property under the Takings Clause. Furthermore, if no exaction has been imposed, there

is no basis for an award of just compensation in exchange for the taking of an exacted interest.

Both the Florida Supreme Court and Judge Jacqueline Griffin (in her dissent from the ruling of the Florida Court of Appeals) embraced this straightforward logic. In both *Nollan* and *Dolan,* the Florida Supreme Court stated, "the regulatory entities issued the permits sought with the objected-to exactions imposed," and the *Nollan / Dolan* standards only apply to exactions "rendering the owners' interest in . . . property subject to the dedication imposed." *St. Johns River Water Management District v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2012). Judge Griffin expressed the same idea in more colorful terms: "[I]n what parallel legal universe or deep chamber of Wonderland's rabbit hole could there be a right to just compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none were given up by the owner?" *St. Johns River Water Management District v. Koontz*, 5 So. 3d 8, 20 (Fla. Dist. Ct. App. 2009). *See also Lambert v. City & County of San Francisco*, 67 Cal. Rptr. 2d 562 (Cal. Ct. App. 1997), *cert. denied*, 529 U.S. 1045, 1551 (2000) (Scalia, J., dissenting) (noting, in a similar case, that, "[i]t is undeniable . . . that the subject of any supposed taking in the present case is far from clear. . . . Whereas in *Nollan* and in *Dolan* [the government had imposed an actual exaction], *in the present case there is neither a taking nor a threatened taking of any [property].*") (emphasis added).

The *Nollan/Dolan* standards cannot logically be extended to denials of permit applications for the additional reason that a basic premise of these decisions was government regulators always have the

option to deny the application instead of issuing a permit with conditions and a takings claim arising from such a denial would be evaluated using the regulatory takings standards. Indeed, the fact the regulatory takings standards would apply to a takings claim arising from a denial was the central reason the Court concluded in both cases that a *per se* takings test could not apply to an exaction, and why the Court devised the intermediate-scrutiny "essential nexus" and "rough proportionality" tests instead. Because the availability of the option to deny a permit was one of the premises of the Court's analysis in *Nollan* and *Dolan*, it is plainly illogical to contend that, if the government *actually* opts to deny a permit, the permit denial can give rise to anything other than a traditional regulatory takings claim. Indeed, to suggest that the *Nollan/Dolan* standards should be extended to such permit denials would contradict the basic reasoning of *Nollan* and *Dolan* themselves.

All of these points emanate from the same basic fact—for constitutional purposes, there is all the difference in the world between when government contemplates taking some action and when it actually takes that action. A citizen may ponder trespassing on his or her neighbor's land but such an unneighborly thought is different as a matter of law from an actual trespass. Likewise, government contemplation of imposing an exaction cannot sensibly be equated with actually imposing an exaction. The Takings Clause only applies when government has "taken" property for public use, and the regulatory takings doctrine only applies when a regulatory act is "functionally equivalent" to an actual taking. *Lingle*, 544 U.S. at 539. The government must take an

affirmative act, not an attempted or contemplated one, before it faces takings liability. As Judge Griffin stated in her dissent, "[i]t is not the making of an offer to which unconditional conditions are attached in violation of the limitations of *Nollan/Dolan* that gives rise to a taking; it is the receipt of some tangible benefit under such coercive circumstances that gives rise to the taking." *See Koontz*, 5 So. 3d at 20 (Griffin, J., dissenting).

Petitioner and its *amici* go awry in invoking the "unconstitutional conditions" doctrine to support their argument for extending *Nollan* and *Dolan*. It is undeniable the *Nollan/Dolan* standards involve a "special application" of this doctrine, *Lingle*, 544 U.S. at 547, but this case is more appropriately resolved by directly addressing the proper scope of the *Nollan/Dolan* standards, and the underlying rationales for these standards, rather than by resorting to abstract discussion of the unconstitutional conditions doctrine. For example, if the government made it a condition of continued employment that an employee convert to Buddhism, but then fired the employee for refusing to accede to the condition, *amici* have no doubt the courts would conclude the First Amendment would be equally offended by either the firing or the imposition of the employment condition. But when negotiations over possible land use exactions fail, and the government exercises its authority to deny the application, the same equivalence does not exist. A permit denial differs from a permit issuance with an exaction both in terms of the property at issue (the regulated real property, versus the exacted property interest) as well as the appropriate takings test (traditional regulatory takings tests

based on limitations on use, versus the *Nollan / Dolan* standards applicable to exactions).

Precedent. Relevant Court precedent also supports, if not commands, rejection of petitioner's theory. In *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999), the Court rejected the argument, identical to the argument in this case, that *Dolan*'s "rough proportionality" test should govern a takings claim based on a permit denial. The Court said:

> [W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use. The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. *It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development.*

526 U.S. at 702-03 (emphasis added). The Florida Supreme Court quite properly believed the ruling in *Del Monte Dunes* required rejection of petitioner's theory, and the force of precedent compels the same conclusion in this Court.

The Court's more recent, unanimous opinion in *Lingle* also refutes petitioner's plea to extend *Nollan* and *Dolan*. The Court described "*Nollan* and *Dolan* [as] involv[ing] Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." 544

U.S. at 546. The Court also accurately described *Del Monte Dunes* as "emphasizing that we have not extended [the *Nollan/Dolan*] standards beyond the special context of . . . exactions." *Id.* at 547, quoting *Del Monte Dunes*, 526 U.S. at 702. *See also Lingle,* 544 U.S. at 547 (explaining that *Dolan* refined the exactions test by holding that "an adjudicative exaction *requiring* dedication of private property must also be 'roughly proportional'") (emphasis added).

Finally, petitioner's proposal to extend *Nollan* and *Dolan* is inconsistent with the Court's holding in *Lingle* that the failure-to-substantially-advance formula has "no proper place in takings jurisprudence." Indeed, petitioner's argument would reverse this important precedent. At the outset of this litigation, well before the *Lingle* decision, petitioner's principal claim was that the District's rejection of his application was a taking of his real property holding because the decision unreasonably refused to accept petitioner's objections to the appropriateness of various permit conditions the District suggested and, therefore, failed to substantially advance a legitimate state interest. *See* 1997 Second Amended Complaint, JA at 4. However, as the litigation proceeded, and following the Court's decision in *Lingle,* petitioner changed the label affixed to his case from the substantially advances formula to the *Nollan/Dolan* formula. *See Koontz*, 5 So. 3d at 16 (Griffin, J., dissenting) (explaining how petitioner's "original theory of liability evaporated" over the course of the litigation). Given that petitioner's present claim remains, in substance, the same as its prior substantially advances claim, allowing this novel *Nollan/Dolan* claim to proceed would effectively revive the substantially advances theory so recently repudiated in *Lingle*.

Because petitioner's claim is identical to a substantially advances claim, it falls outside the scope of takings doctrine for the same reasons that the substantially advances inquiry falls outside takings doctrine. In *Lingle*, the Court explained that the substantially advances inquiry does not fit in takings doctrine because it "reveals nothing about the magnitude or character of the burden a particular regulation imposes on private property rights." 544 U.S. at 542. In addition, the Court explained that the substantially advances inquiry does not fit in takings law because it "probes the regulation's underlying validity," raising an issue that "is logically prior to and distinct from the question whether a regulation effects a taking,"—that is, whether the regulation serves a valid public purpose. *Id.* at 543. Likewise, in this case, the petitioner's claim that the permit denial was unreasonable because it was based on the District's assertedly unreasonable refusal to accept petitioner's objections to various proposed conditions reveals nothing about the magnitude of the burden the permit denial placed on petitioner's real property interest. Also, petitioner's claim in this case involves a challenge to the underlying validity of the government permit denial, raising an issue that is "logically prior to" any potential question as to whether the denial resulted in a taking.

Policy. Apart from the fact that petitioner's theory is incoherent as a matter of doctrine and contrary to precedent, its adoption would create serious practical problems for local governments. The Court has recognized the importance of local land use planning and regulation to support healthy communities. *See Dolan*, 512 U.S. at 396 ("Cities have long engaged in the commendable task of land use planning, made

necessary by increasing urbanization, particularly in metropolitan areas . . . .") Applying *Nollan* and *Dolan* beyond the context of actual exactions would lead to more intrusive and frequent legal challenges to land use decisions, undermining local governments' capacity to carry out their planning and regulatory responsibilities. In *Lingle* the Court observed that the "substantially advances test" presented "serious practical difficulties" because the test "can be read to demand heightened means ends review" of government regulation. 544 U.S. at 544. The exact same "practical difficulties" would be created by petitioner's proposed extension of *Nollan* and *Dolan* because it too would involve application of a heightened standard of review. The conclusion that the substantially advances test and petitioner's proposed extension of *Nollan* and *Dolan* pose the same practical difficulties follows logically from the fact that the proposed extension of *Nollan* and *Dolan* is, in fact, the substantially advances theory dressed up in new terminology.

Petitioner's proposed expansion of the *Nollan / Dolan* doctrine is also unworkable because it would foster frequent, unsolvable controversies. Was the permit denied because of the government's inability to negotiate acceptable exactions, or for some other reason? *See Lambert*, 529 U.S. at 1550-51 (Scalia, J., dissenting) (identifying and struggling with this question). Which specific exaction or exactions might have been imposed if a permit had been issued? Would any or all of such possible exactions have met the *Nollan / Dolan* standards, and how should a trial court decide this question absent an administrative record? *See Koontz*, 77 So. 3d at 1231-32 (Polston, J., concurring) (noting administrative exhaustion

requirements that petitioner evaded). All of these questions would lead the courts into hopeless speculation over what might-have-beens. The potential problems for local government are highlighted by the facts of this particular case; the record shows that the District suggested over a half dozen different conditions to petitioner to mitigate the effects of the development, all of which he rejected.

Petitioner's proposal also would have perverse, harmful consequences for property owners seeking to develop their property for profit. Conditions attached to development authorizations often provide an effective and relatively inexpensive way of addressing the negative externalities associated with development. Thus, exactions and other conditions attached to development approvals often produce "win-win solutions" that allow developers to achieve all or most of their development objectives while addressing the legitimate concerns of public officials and their constituents about the adverse effects of development. *See* Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 50 (2000); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 668-78 (2004). If even discussing potential exactions could expose local governments to takings claims under *Nollan* and *Dolan*, local officials would be reluctant to discuss such compromise solutions. Instead, they would frequently seek to protect the public interest by simply rejecting development proposals. *See Koontz*, 77 So. 3d at 1231 (to avoid liability under petitioner's expanded version of *Nollan* and *Dolan*, "agencies will opt to simply deny permits outright without discussion or negotiation rather than risk the

crushing costs of litigation"); *see also Koontz*, 5 So. 3d at 21 (Griffin, J., dissenting) ("No agency in its right mind will wander into this swamp."). This outcome may well safeguard the public fisc, but it would hardly serve the interests of property owners seeking to develop their property.

Finally, even if accepting petitioner's theory would not completely freeze the negotiating process, it would badly skew it. Under petitioner's theory, local officials would expose their communities to potential liability if they proposed specific permit conditions that property owners objected to and ultimately sued over. Local officials' probable response to this risk would be to remain completely mute in response to offers from a developer, unless and until the developer arrived at an offer that the officials believed was acceptable. No practical purpose would be served by encouraging this type of one-sided conversation between developers and communities.

Other Potential Claims. The conclusion that a property owner cannot bring a *Nollan/Dolan* exactions claim when no exaction has been imposed certainly does not mean that a property owner could never bring a potentially viable constitutional challenge in circumstances such as these. First, as discussed above, whenever the government rejects a development application, such a decision potentially gives rise to a claim under *Penn Central* or, in some instances, under *Lucas*. Thus, like any frustrated property owner who feels he or she has suffered an unfair permit denial, a plaintiff might pursue a regulatory takings claim. Petitioner apparently waived any possible regulatory takings claim in this case. But the important point going forward is that the Court's rejection of the petitioner's novel

Nollan/Dolan theory would not preclude a future claimant from proceeding in this fashion.

Second, plaintiffs in petitioner's position could challenge a permit denial in circumstances such as these under the Due Process Clause. *See, e.g., United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003) (Alito, J.) (evaluating a due process claim based on a permit denial purportedly motivated by a developer's refusal to pay an impact fee a city proposed). In general, the Due Process Clause provides protection for property owners against egregious government action. *See Lingle*, 544 U.S. at 548 (Kennedy, J., concurring). Judicial review of government action under the Due Process Clause unquestionably is and should be deferential. *See Lingle*, 544 U.S. at 545 ("we have long eschewed . . . heightened scrutiny when addressing substantive due process challenges to government regulation"). Indeed, petitioner's attempt to import heightened scrutiny into this case by reframing what is in substance a due process claim as a takings claim is one of the basic reasons *amici* urge the Court to reject petitioner's position.

Nonetheless, the Due Process Clause can be deployed to provide appropriate relief in appropriate cases. *Amici* reject the suggestion of petitioner and many of his *amici* that affording a claimant the Due Process Clause's protection is equivalent to offering him or her no constitutional protection at all. Just as the Takings Clause is "as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment," *Dolan*, 512 U.S. at 392, so too the Due Process Clause is as much a part of the Bill of Rights as these other provisions. *See, e.g., Romer v. Evans*,

517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

II. The *Nollan/Dolan* Standards Do Not Apply to Permit Conditions Imposing Monetary Payment Obligations.

There is a second, independent reason the Court should affirm the judgment below. Petitioner's takings claim seeks to apply *Nollan* and *Dolan* to the situation where an alleged exaction does not affect tangible property, but instead involves a government-imposed monetary liability. Because *Nollan* and *Dolan* cannot logically be extended in this fashion either, the Court should reject petitioner's takings claim on this ground as well.

As discussed above, the *Nollan/Dolan* framework only applies when an alleged exaction involves an intrusion on private property that, imposed independently of any regulatory review process, would constitute a compensable taking under the Takings Clause. Thus, the threshold question in deciding whether *Nollan* and *Dolan* apply to regulatory conditions imposing monetary liability is whether the unilateral imposition by the government of an obligation to pay money constitutes a taking. Because the answer to this question is "no," *Nollan* and *Dolan* do not apply to permit conditions involving a monetary obligation.[2]

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[2] *Amici* do not rely on the suggestion that *Nollan* and *Dolan* should be limited to alleged exactions involving interests in real property. It is accurate to observe that *Nollan* and *Dolan* involved exactions of interests in land. However, in principle, the logic of these precedents extends to alleged exactions involving any type of property, real or personal. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-04 (1984).

A five-justice majority already answered this question in *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998); *see id.* at 539-45 (Kennedy, J., concurring in judgment and dissenting in part); *id.* at 554-56 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg). The case involved a constitutional challenge to the retroactive liability provisions of federal legislation requiring coal operators to fund the health care costs of former miners. There was no majority opinion for the Court, but five justices joined in concluding that this kind of generally applicable financial liability cannot support a takings claim. As Justice Kennedy explained, "one constant limitation" in the Court's takings jurisprudence "has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake." *Id.* at 541. Therefore, he concluded, the challenged legislation could not give rise to a viable takings claim:

> The Coal Act imposes a staggering financial burden on the petitioner . . . but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.

This straightforward point does not resolve the question of whether *Nollan* and *Dolan* can or should extend to conditions involving government-imposed mandates to pay money.

Id. at 540. The four dissenting justices in *Eastern Enterprises* agreed with Justice Kennedy that the claimant had no viable takings claim, because "[t]he 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property. . . . This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money . . . ." *Id.* at 554 (Breyer, J., dissenting).

Petitioner properly accepts the premise that, in order for *Nollan* and *Dolan* to apply, an alleged exaction must be such that its unilateral imposition, outside of the regulatory permitting context, would constitute a taking. Pet. Brief at 17. But petitioner offers no persuasive support for the argument that this precondition can be met in this case. Petitioner completely ignores *Eastern Enterprises*. At the same time, he relies instead on two federal appeals court decisions that simply advertise the weakness of his position. *See id.* citing *Student Loan Marketing Association v. Riley*, 104 F.3d 397 (D.C. Cir. 1997); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995). Both of these decisions pre-date *Eastern Enterprises* and therefore do not reflect the teachings of that decision. In addition, neither case addresses the question of whether a monetary imposition can constitute a taking. Instead, in both cases the courts merely *assumed* that the plaintiffs had viable takings claims in the course of addressing the threshold question of whether the federal District Court or the U.S. Court of Federal Claims had jurisdiction over plaintiffs' claims. Weaker authority is hard to imagine.

As Justice Kennedy indicated in *Eastern Enterprises*, the general principle that imposition of monetary liability does not implicate the Takings Clause

does not alter the fact that government seizures of specific funds contained in discrete accounts can constitute takings. *See* 524 U.S. at 540; *see, e.g., Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (interest income generated by funds held in IOLTA accounts constitutes property of the owner of the principal under the Takings Clause); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (interest generated by funds in segregated escrow account constitutes property for takings purposes). The difference between these two types of cases is that the imposition of a generalized liability affects total wealth or, in the case of corporations, total asset value, whereas in the case of segregated funds a government action dictating disposition of the funds affects an identifiable property interest. As the Court stated in *United States v. Sperry Corp.*, 493 U.S. 52, 66 n.9 (1989), "[u]nlike real or personal property, money is fungible."

As a matter of first principles, the conclusion of the five-justice majority in *Eastern Enterprises* was correct, and the Court should take this opportunity to reaffirm that ruling. Starting with the constitutional text, the language of the Takings Clause indicates that it does not extend to financial liabilities imposed by the government. The word "taking" in the Takings Clause is naturally read to refer to government action affecting some identifiable "thing." *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA L. REV. 885, 976-77 (2000) ("In order to expropriate, confiscate, seize, or take property, one must identify a particular piece of property—a 'thing'—that has been expropriated, confiscated, seized, or taken."). Imposition of a generalized obligation to pay money is not within the scope of the

Takings Clause because such a mandate does not affect a particular "thing." As Professor Merrill succinctly observed, "[o]ne cannot 'take' the bottom line of a balance sheet." *Id.*

The historical background to the Takings Clause confirms that the drafters were motivated by a concern about potential takings of an actual "thing," or to use Justice Kennedy's terminology, an "identified property interest." "The Takings Clause was prompted in part by concerns that emerged during the Revolutionary War years about military units requisitioning supplies without compensation." *Id.* at 984, citing 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 305-06 (1803). The drafters also were motivated in part by a concern about potential seizures of the most controversial form of property in U.S. history, slaves. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 839 (1995). Nothing in this history supports the idea that government impositions of financial liability on citizens should expose the public to takings claims.

Furthermore, the modern regulatory takings tests cannot be applied easily to alleged takings based on government impositions of monetary liability, supporting the conclusion that this type of government imposition is outside the scope of the Takings Clause. *See* Merrill, *The Landscape of Constitutional Property, supra* at 977. This is hardly surprising because the Court's modern takings jurisprudence "aims to identify regulatory actions that are functionally

equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. An asserted taking involving the imposition of monetary liability cannot easily be equated with a "classic taking."

Petitioner could attempt to frame his claim in one of two ways, each equally unavailing. On the one hand, he could argue that every government imposition of financial liability could be conceptualized as a *per se* taking, on the theory that a transfer of funds from a private citizen to the government constitutes a form of outright appropriation. *Cf. Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949) (government appropriation of leasehold in real property constitutes a compensable taking). But, on that view, the government presumably would be disabled from directly imposing virtually *any* type of financial assessment, user fee, or tax without triggering the Takings Clause. That conclusion is so far outside our legal traditions as to be unthinkable.

On the other hand, Petitioner could argue that takings claims based on government impositions of financial liability must be reviewed under the Court's regulatory takings tests. But it would be nonsensical to attempt to address whether the imposition of some financial liability deprived a claimant of "all economically viable use" of an asserted property interest in money. *See Lucas,* 505 U.S. at 1004. It would be equally difficult to apply the three-factor *Penn Central* framework to this type of case. *Penn Central* requires courts to consider the economic impact of the government action, the degree of interference with investment-backed expectations, and the character of the government action. None of these factors can

sensibly apply to an alleged taking based on government-imposed financial liability; they are only designed to apply to an alleged taking of some discrete item of property. "The diminution in value is the loss in value of a discrete thing. The interference with investment-backed expectations refers to the expectations regarding a discrete investment. And the character of the government's action, that is to say, how intrusive it is, refers to its action with respect to an identified resource." Merrill, *The Landscape of Constitutional Property, supra* at 977.

If the Takings Clause were expanded as petitioner requests, government entities that levy ordinary taxes could face takings liability. There is no principled basis for distinguishing between the types of monetary assessments discussed in this case, the financial liability imposed in *Eastern Enterprises*, and a wide variety of public taxation programs. *See Eastern Enterprises*, 524 U.S. at 556 (Breyer, J., dissenting) (observing that the idea of applying the Takings Clause to financial liabilities "bristles with conceptual difficulties," not least because "If the [Takings] Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.*, when it assesses a tax?"). Converting taxes into potential takings would be a revolutionary step, for as far back as 1880, the Court explained that "taxation for a public purpose, however great, [is not] the taking of private property for public use, in the sense of the Constitution." *Mobile County v. Kimball*, 102 U.S. 691, 703 (1880). The Court has never wavered from this position. *See also Brown v. Legal Foundation of Washington*, 538 U.S. 216, 243 (2003)

(Scalia, J., dissenting) ("[t]axes and user fees . . . are not takings").

Last but certainly not least from the perspective of *amici*, representing state and local governments across the country, petitioner's proposed expansion of the takings doctrine threatens to place major burdens on them, not only in the context of alleged exactions, but, for reasons just discussed, in the context of taxation. As Justice Kennedy explained in *Eastern Enterprises*, expanding the Takings Clause to encompass generalized financial obligations would "subject[] States and municipalities to the potential of new and unforeseen claims in vast amounts." 524 U.S. at 542. That statement accurately captures the problem *amici* would face if the Takings Clause encompassed government-imposed generalized financial liabilities.

The Takings Clause's specified remedy of "just compensation" raises additional difficulties for petitioner's argument that a mandate to pay money can establish takings liability. As the Court explained in *Lingle*, "the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'" 544 U.S. at 536-37 (quoting *First English Evangelical Lutheran Church*, 482 U.S. at 314). "In other words, it 'is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.'" *Id.* at 536-37, (quoting *First English Evangelical Lutheran Church*, 482 U.S. at 315). It would be awkward, at best, to attempt to implement the Takings Clause's compensation requirement in the case of an alleged taking of money, because such a claim would simply attempt to

force the government to return to the claimant the money the government has just "taken" from the claimant. At a minimum, expanding takings doctrine to encompass general monetary liabilities would require thorough redesign of the basic architecture of takings law. *Cf. Eastern Enterprises,* 524 U.S. at 522 (plurality opinion) (proposing an *ad hoc* exception to the principle that the Takings Clause is a money-mandating constitutional provision to accommodate the possibility of a takings claim based on a federal statute mandating monetary payments).

Beyond all this, there is simply no need to torture the Takings Clause in an attempt to make it fit this type of case, just as there was no justification for torturing the Takings Clause to address the claim in *Eastern Enterprises*. As Justice Kennedy stated in *Eastern Enterprises*, in a constitutional challenge to a monetary mandate, "the more appropriate constitutional analysis arises under the general due process principles rather than under the Takings Clause." 524 U.S. at 545. Moreover, the practical availability of the due process alternative is well established. *See, e.g., United Artists Theatre Circuit*, 316 F.3d 392; *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 136 (Fla. 2000) (striking down a school impact fee for failing both prongs of Florida's "dual rational nexus" test for impact fees).

The text of the Due Process Clause indicates that it has a broader scope than the Takings Clause. The Due Process Clause protects against "deprivations" of "property," in contrast with the Takings Clause's protection against "takings" of "private property." As discussed above, the term "taking" connotes a seizure or appropriation of some "thing;" by contrast, the term deprivation is sensibly read to be broader and

include government monetary exactions affecting wealth. In addition, use of the term "property" in the Due Process Clause, in contrast to the use of the phrase "private property" in the Takings Clause, also suggests that the Due Process Clause has a broader scope than the Takings Clause.

For all of these reasons, the five-justice majority in *Eastern Enterprises* correctly recognized that a challenge to government-imposed financial liability cannot raise a viable Takings Clause claim. Given this fact, a development condition imposing a mandate to pay money cannot trigger *Nollan* and *Dolan*, and the mere discussion of possible conditions of this type between a developer and local officials certainly cannot do so.

III. Local Governments Require Reasonable Latitude in Constitutional Review of their Regulatory Activity in Order to Function Effectively and Responsibly.

Apart from the doctrinal incoherence and utter impracticability of petitioner's attempt to apply the *Nollan/Dolan* framework to possible conditions on development approval that were never actually imposed and/or to government impositions of monetary liability, the broader policy arguments by petitioner and his *amici* for extending *Nollan* and *Dolan* to this type of case also are misguided.

The *amicis*' attacks on local government paint a picture that, based on our knowledge and experience, bears no relationship to reality. For example, one brief asserts that "municipalities will take any available opportunity to use exactions to impose extortionate conditions on property owners." Brief for Institute for Justice et al. as Amici Curiae Sup-

porting Petitioner at 37. In fact, conscientious local officials work hard on a daily basis to fairly balance the numerous competing demands they confront in administering the regulatory process. Local elected officials and their appointees seek not only to follow the law but to respond, as they properly must, to the expressed preferences of voters, who, of course, include property owners and developers. Developers and organizations of developers play a very active role in the local political process, *see* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 479 (1991), and their interests are well represented and taken into account in the development review process. This particular case, in which the District identified half a dozen alternative pathways for getting to "yes" on petitioner's development proposal (plus any pathways petitioner might have suggested), typifies the way in which local officials generally make strong efforts to approve development proposals while also safeguarding the public welfare.

In a twist on the old saying that a lawyer with bad facts should argue the law and a lawyer with bad law should argue the facts, petitioner's *amici* expend enormous time and effort arguing the asserted facts of *other* cases. These anecdotes are variously based on (1) untested allegations included in complaints, (2) newspaper accounts, (3) anecdotes recycled from earlier *amicus* briefs filed in other cases, (4) accounts of alleged conditions that were never challenged in court or that were the subject of legal challenges that failed for procedural reasons, (5) blog postings or web entries by property rights advocates, (6) assertions in (unsuccessful) petitions for *certiorari*, (7) cases

involving unrelated legal issues, such as condemnation actions, or (8) simply bald assertions. This hodgepodge of unreliable, unverifiable, and irrelevant stories provides no help to the Court in resolving *this* case.[3]

Petitioner's argument for expanding takings doctrine should be assessed in light of the significant challenges that the Court's recent expansion of takings doctrine has already created for local government. As a result of the decision in *First English Evangelical Lutheran Church*, if local officials guess wrong on whether a regulatory action will give rise to takings liability, and even if they are willing to promptly rescind the regulation in the face of an adverse court judgment, the community can be held liable for millions of dollars to a developer for a "temporary taking." Furthermore, as a result of the Court's determination that most taking cases should be resolved based on the facts and circumstances of the particular case, it is often difficult for expert counsel, and even more so for a general practitioner typically representing local governments, to accurately predict how takings cases will be decided. Finally, local governments generally lack and cannot obtain insurance to cover takings awards, and, of course, have no access to the unlimited Judgment Fund from which the United States covers its takings liabilities. Add all of these factors together and it is obvious why the threat of takings litigation under modern takings doctrine has had a chilling effect on local land use regulatory authority. Attorneys representing developers have been empowered to

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[3] Preliminary research into several of *amicis'* anecdotes confirms that there would be a great deal to say on the other side, if they were before the Court.

routinely threaten local officials with potentially expensive takings lawsuits, and just as routinely, prudent local officials have felt compelled to reverse or alter their intended course to forestall litigation. *See* DANIEL POLLACK, CALIFORNIA RESEARCH BUREAU, HAVE THE U.S. SUPREME COURT'S 5TH AMENDMENT TAKINGS DECISIONS CHANGED LAND USE PLANNING IN CALIFORNIA?, CALIFORNIA RESEARCH BUREAU REPORT NO. CRB-00-004 (Mar. 2000).

The vulnerability of local governments to this kind of intimidation is due in part to the small size and modest budgets of many local governments. There are some 36,000 cities and towns across the country. Over 90 percent of all cities and towns have populations less than 25,000, and approximately 85 percent have populations less than 10,000. *See* U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS (Dec. 2002), *available at* http://www.census.gov/prod/2003pubs/gc021x1.pdf. Similarly, out of 3,068 counties, 23 percent have populations less than 10,000. *See County Intelligence Connection*, NATIONAL ASSOCIATION OF COUNTIES, http://www.naco.org/research/data/Pages/default.aspx (last visited Dec. 24, 2012). Virtually without exception, local governments with populations under 10,000 have no full-time legal staff. These smaller communities are typically forced to hire outside legal counsel each time they are sued, or even threatened with suit, imposing large and unexpected burdens on small governmental budgets. An actual takings award, even for a mere temporary taking, can come close to bankrupting a small town and imposes burdensome costs on all but the very largest jurisdictions.

Admittedly, the actual consequences in particular communities of the substantial leverage provided to

developers by modern takings jurisprudence is hard to document. But is fair to observe that the increasing challenges communities face today in controlling sprawl development, protecting critical natural resources, increasing housing affordability, preserving agricultural lands, and achieving other important land use goals are attributable in part to the modern expansion of takings doctrine. Further expansion of takings doctrine, as advocated by petitioner, would simply compound the challenges.

Petitioner's proposed expansion of takings law also would have serious constitutional costs. By constraining the authority of local officials such a move would undermine the Tenth Amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,"), the Guaranty Clause in Article IV, section 4 of the Constitution ("The United States shall guarantee to every State in this Union a Republican Form of Government"), and the promise implicit in the opening lines of the Constitution, "We the People of the United States," that is, in the immortal words of President Abraham Lincoln, a "government of the people, by the people, for the people." Petitioner's proposed expansion of takings law represents a genuine threat to democratic government at the local level, where a primary function of government is precisely to manage land use.

Petitioner's proposal to expand *Nollan* and *Dolan* is particularly troubling because those decisions represent dramatic departures from the Court's normal approach of mandating deferential review of the constitutionally of social and economic regulation. *See Lingle,* 544 U.S. at 545; *see also City of Cuyahoga*

Falls v. Buckeye Community Hope Foundation, 538 U.S. 188, 198 (2003) (rejecting a due process challenge to denial of a building permit that in "no sense constituted egregious or arbitrary government conduct"). Without questioning that *Nollan* and *Dolan* represent binding precedent, or the justifications for the heightened scrutiny established by those decisions in the "special context of exactions," an expansion of those precedents beyond their proper domain would have serious adverse consequences for local governments. Under ordinary substantive due process review of administrative action, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)). In addition, the party challenging the constitutionality of government action ordinarily bears the burden of proof. Under *Nollan* and *Dolan*, by contrast, the courts must make an "individualized determination" about whether an exaction meets the particularized "essential nexus" and "rough proportionality" tests. The review standard involves intermediate scrutiny, rather than ordinary deferential review. And, perhaps most importantly, the burden of proof has been shifted from the regulated party to the government.

The reasons supporting deferential review of social and economic legislation are by now well established. The courts are not "well suited" to judge "the efficacy of" government regulations, an observation that applies with special force to the vast array of state and local land use regulations. *Lingle*, 544 U.S. at 544; *see also Village of Belle Terre v. Boraas*, 416 U.S. 1, 16 (1974) ("Our role is not and should not be to sit

as a zoning board of appeals."). In addition, under the separation of powers doctrine, courts are reluctant to "substitute their predictive judgments for those of elected legislatures and expert agencies." 544 U.S. at 544. And, in the context of a suit involving local government, deferential federal constitutional review supports federalism. Contrary to the suggestion of certain of petitioner's *amici*, the Court's fidelity to the principle of judicial deference is not designed to suit the "convenience" of government bureaucrats. Instead, it is central to the U.S. constitutional system of government. In sum, the extraordinary and settled character of the *Nollan/Dolan* standards, by itself, argues forcefully against extending those decisions.

Another important consideration in evaluating petitioner's proposal is that the *Nollan/Dolan* standards necessarily apply to every permit application. Extension of those standards would also presumably apply in a similar manner, precluding any exemption for small-scale development projects. Legislation mandating that government agencies review proposed development activity typically includes some kind of threshold. *See, e.g.*, National Environmental Policy Act, 42 U.S.C. § 4332 (restricting the requirement to prepare an environmental impact statement to "major Federal actions significantly affecting the quality of the human environment"). By their nature, however, the *Nollan/Dolan* standards, including the requirement of an "individualized determination" to support each exaction imposed, must be applied to any development project authorized subject to any exaction, regardless of the developments size or impact. Under petitioner's proposal, the same requirement of an individualized

determination would also apply across the board, regardless of the size of the development, and it would apply in each instance in which any of a variety of possible exactions were even considered. The volume of government decision-making that would be swept up by these new requirements is staggering.

Finally, monetary impact fees imposed on developers represent a common and entirely legitimate way for communities to address the costs that development places on the larger community. Impact fees come in essentially two forms: first, impact fees that are designed to reimburse the community for the special benefits that new, publicly-financed infrastructure or other public projects confer on particular developers; and, second, impact fees that help finance efforts to mitigate the burdens or harms to the community produced by a particular development. In either case, the essential inquiry is whether a cost (either of providing a benefit, or mitigating a harm) should be imposed on the general community by having all taxpayers pay it (or, what may amount to same thing, by simply leaving a harm or burden unaddressed) or on a specific portion of the community specially benefited by a public project or specially responsible for a harm.

As Justice Holmes explained many years ago, determining the proper allocation of such financial responsibilities is a matter of "forecast and estimate," *Louisville & Nashville Railroad Co. v. Barber Asphalt Paving Co.*, 197 U.S. 430, 433 (1905), and hence peculiarly within the purview of the legislatures and expert agencies. As a result, the Court has long said courts must uphold the other branches' judgments about how to allocate the costs of special benefits

unless they are "palpably arbitrary." *Houck v. Little River Drainage District*, 239 U.S. 254, 262 (1915). Logic supports application of the same deferential standard when government seeks to assess impact fees to address the burdens and harms caused by specific development projects.

Developers operating in a competitive environment have an obvious economic incentive to seek to reduce their costs and maximize their profits by reaping the benefits of public infrastructure investments without helping to pay for them and avoiding or minimizing responsibility to pay to mitigate the harms associated with their projects and shunting these costs to the general taxpayers or the community. But every time a developer succeeds in avoiding paying a cost that should fairly be assigned to the developer, the cost does not disappear. It is simply shifted to others.

These types of conflicts are frequent, complicated, and not generally susceptible to easy, across-the-board solutions. The Court has consistently opted in favor of assigning primary responsibility for making these judgments to elected officials and their appointees, and upholding their judgments absent some clear abuse of power. In seeking to force government officials to bear the burden of proof in each instance to justify particular impact fees—and even potential impact fees that were merely contemplated but never actually imposed—petitioner is advocating nothing less than a revolutionary change in the law. The Court should reject the invitation.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Florida Supreme Court.

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AMICUS CURIAE BRIEF

No. 11-1447

In The
Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

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QUESTION PRESENTED

This brief addresses the second Question Presented:

Whether the nexus and proportionality tests set out in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Owners' Counsel of America (OCA) is a national, invitation-only network of the most experienced eminent domain and property rights attorneys who seek to advance, preserve and defend the rights of private property owners and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right" and the basis of a free society. *See* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998).[1]

As the lawyers on the front lines of takings law, OCA members understand the importance of the issues in this case, and how the rule adopted by the Florida Supreme Court, if allowed to stand, will undermine the check on the unbridled exercise of governmental powers that the Takings Clause provides. An exaction should not be subject to lesser constitutional standards simply because the property demanded in exchange for the surrender of fundamental rights is not land.

OCA brings unique expertise to this task. OCA is a non-profit organization, organized under IRC § 501(c)(6) and sustained solely by its members. Only

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[1] All counsel of record consented to the filing of this brief. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus made a monetary contribution toward the preparation or submission of this brief.

one member lawyer is admitted from each state. Since its founding, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and to make that opportunity available and effective to property owners nationwide. OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or amici in many of the takings cases this Court has considered in the past forty years, including *Nollan* and *Dolan*, the two decisions at the heart of the case at bar. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010). Most recently, OCA

filed an amicus brief in *Arkansas Game & Fish Comm'n v. United States*, No. 11-597 (cert. granted Apr. 2, 2012).

OCA members have also authored treatises, books, and law review articles on regulatory takings, eminent domain, and the exactions issue, including MICHAEL M. BERGER, TAKING SIDES ON TAKINGS ISSUES (Am. Bar Ass'n 2002 (chapter: *What's "Normal" About Planning Delay?*); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U.J.L. & POLICY 99 (2000); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 9 LOY. L.A.L. REV. 685 (1986); WILLIAM G. BLAKE, THE LAW OF EMINENT DOMAIN – A FIFTY STATE SURVEY (Am. Bar Ass'n 2012) (editor); LESLIE A. FIELDS, COLORADO EMINENT DOMAIN PRACTICE (2008); JOHN HAMILTON, KANSAS REAL ESTATE PRACTICE AND PROCEDURE HANDBOOK (2009) (chapter on *Eminent Domain Practice and Procedure*); JOHN HAMILTON & DAVID M. RAPP, LAW AND PROCEDURE OF EMINENT DOMAIN IN THE 50 STATES (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL OF RTS. J. 679 (2005); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"*,

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OCA believes that its members' long experience in advocating for property owners and protecting their constitutional rights will provide an additional, valuable viewpoint on the issues presented to the Court.

SUMMARY OF ARGUMENT

It is no great stretch to apply the nexus and proportionality standards to *all* exactions, and not just those demanding land. Like land, money is property, and should be subject to the same rules. Requiring compliance with *Nollan* and *Dolan* when government seeks money or other property in exchange for discretionary permits will not impose a significant burden on land planners, other than the requirement that they, like other officials, follow the Constitution. If the constable must understand the limitations the Constitution places on her powers, so must the planner. *See San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting). The standards for land exactions articulated in *Nollan* and *Dolan* have been

part of the regulatory landscape for nearly two decades, yet planning has not ground to a halt as a result. Indeed, in those jurisdictions in which state and local officials must adhere to the nexus and proportionality standards for all exactions, regulation is robust and the sky has not fallen. Neither will it fall if the nexus and proportionality standards are applicable everywhere else.

This brief makes two points. First, a requirement that owners provide money or make other tribute as a condition of exercising the constitutional right to own and use property is just as much a taking as a requirement that owners donate land, because money, like land, is property protected from uncompensated expropriation. Second, applying heightened scrutiny to monetary and other exactions will not unduly interfere with land-use planning. Indeed, requiring that state and local governments demonstrate a nexus and rough proportionality for land exactions has improved planning by making the rules more concrete and the process more transparent. There is no reason to believe the same will not hold true when applied to all exactions.

ARGUMENT

I. THE FIFTH AMENDMENT PROTECTS ALL PROPERTY, INCLUDING MONEY

In *Dolan*, this Court explained that the "government may not require a person to give up a constitutional right – here the right to receive just

compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." *Dolan*, 512 U.S. at 385. The point of this analysis is not to insure that compensation is paid *post hoc* as in most other circumstances where the Takings Clause is invoked. Rather, the nexus and proportionality requirements serve as proscriptive checks on the exercise of government's police power by forcing regulators to expressly articulate the relationship between the exaction and the owner's proposed use, and by insuring the owner is not being required to bear more than his proportionate share of public burdens. *Compare Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) (Takings Clause does not proscribe the taking of property, only takings without compensation) *with Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (the Takings Clause "stands as a shield against the arbitrary use of governmental power"), *and Babbitt v. Youpee*, 519 U.S. 234, 239 (1997) (affirming district court's invalidation of statute for violation of the Takings Clause because statute "made no provision for the payment of compensation"). *Nollan* and *Dolan* represent a "special application" of the unconstitutional conditions doctrine in the land-use arena. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547 (2005). In these situations, the Constitution requires "especially strong justification by the state." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1419 (1989). Although it is wrong for

government to force someone to choose between surrendering their rights in order to receive a government *benefit*, it is even more odious to force this choice on someone who seeks to exercise a *fundamental civil right* – in this case, the right to use her own land. *Nollan*, 482 U.S. at 833 n.2 ("the right to build on one's own property . . . cannot remotely be described as a 'governmental benefit'"). *Cf. Sherbert v. Verner*, 374 U.S. 398 (1963) (state may not refuse unemployment benefits to person who rejects job requiring him to work on day when his religion requires him to rest); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (school may not discharge teacher for exercising his First Amendment right to free speech).

Contrary to the Florida court's assertion, neither *Nollan* nor *Dolan* – nor any of this Court's subsequent decisions – establish an artificial distinction between exactions of land and all other demands. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 77 So. 3d 1220, 1230 (Fla. 2011) ("Moreover, in *Del Monte Dunes* and *Lingle*, the United States Supreme Court specifically limited the scope of *Nollan* and *Dolan* to those exactions that involved the dedication of real property for a public use."). Such a distinction would require this Court to conclude that money is not a property interest protected by the Takings Clause. This Court, however, repeatedly has concluded that money is a property interest. *See, e.g.*, *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (interest earned on principal is property); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998)

(plurality) (assets); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998) ("the principal held in . . . trust accounts is the 'private property' of the client"); *Webb's Fabulous Pharmacies*, 449 U.S. at 164 (1980) (interest earned on principal is property). This Court has also recognized other varied interests as property. *See, e.g., Hodel v. Irving*, 481 U.S. 704 (1987) (right of descent and devise is property); *Ruckleshaus v. Monsanto*, 467 U.S. 986, 1002 (1984) (intellectual property); *Andrus v. Allard*, 444 U.S. 51 (1979) (eagle feathers); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (mortgages); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 9-11 (1949) (business goodwill); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (contracts). In *Nollan*, this Court held "[w]e view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." *Nollan*, 483 U.S. at 839. Yet, enshrining a distinction between land and all other property interests would do just that.

This Court has not "specifically limited" *Nollan* and *Dolan* as the Florida court concluded, and should now confirm that the nexus and proportionality standards govern all exactions, because the dynamics in the case at bar are precisely the same as those compelling the *Nollan* and *Dolan* requirements. Those requirements are designed to restrain government's temptation to take advantage of an owner seeking development permissions to force the owner

to shoulder a greater burden than her proposed use is shown to cause. Forcing the owner to bear an excess burden violates the Takings Clause. *See Armstrong*, 364 U.S. at 49 (Takings Clause is designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). A government demand for money should not be subject to lesser standards than demands for other forms of property because *Armstrong*'s rationale applies whether the excess burden is measured in square feet or in dollars.

Numerous state courts are in accord. For example, the Colorado Supreme Court held that damage awards are property because a money judgment "is substantially equivalent to . . . money itself." *Kirk v. The Denver Publishing Co.*, 818 P.2d 262, 269 (Colo. 1991). The court held that a statute which mandated payment to the state of one-third of certain judgments worked a taking:

> Our conclusion derives from the nature of an exemplary damages award as a private property right, the confiscatory character of the "taking" mandated by the statute, and the manifest absence of a reasonable nexus between the statutory taking of one-third of the exemplary damages award and the cost of any governmental services[.]

Id. at 265. Applying the *Armstrong* rationale, the court concluded the statute was a taking because it "has the effect of forcing a select group of citizens –

persons who obtain a judgment for exemplary damages and are successful in collecting on the judgment – to bear a disproportionate burden of funding the operations of state government, which, 'in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 271-72 (quoting *Webb's Fabulous Pharmacies*, 449 U.S. at 163; *Armstrong*, 364 U.S. at 49).

See also Ehrlich v. Culver City, 911 P.2d 429, 447 (Cal. 1996) ("when . . . a government imposes special, discretionary permit conditions on development," the Fifth Amendment governs "whether they consist of possessory dedications or monetary exactions"); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635 (Tex. 2004) (condition requiring improvements to abutting streets could be a taking because by requiring action, the condition is not a use restriction, but "is much closer to a required dedication of property – that being the money to pay for the required improvement."); *Home Builders Ass'n v. City of Beavercreek*, 729 N.E.2d 349, 354-58 (Ohio 2000) (applying the *Nollan* and *Dolan* requirements to impact fee); *Trimen Dev. Co. v. King County*, 877 P.2d 187, 189-90 (Wash. 1994) (park development fee requirement is a taking of property); *Smith v. Price Dev. Co.*, 125 P.3d 945, 953 (Utah 2005) (taking of money is a taking of property).

Nor was it the rationale in *Nollan* and *Dolan* that the easements demanded in those cases were subject to heightened scrutiny because they required public access to the owners' land, and thus were

takings subject to the "physical invasion" *per se* rule. This Court rejected that distinction in *Brown*, holding that the transfer of money (in that case, Interest on Lawyers Trust Accounts) was "akin to the occupation of a small amount of rooftop space" at issue in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (affirming "traditional rule that a permanent physical occupation of property is a taking"). *See Brown*, 538 U.S. at 235.

From the viewpoint of property owners, it makes little difference whether the government demands land, or the exaction is labeled an "in-lieu fee," an "impact fee," a "set-aside," a "housing linkage fee," a "community fee," a "fair share fee," or a "workforce housing requirement." This is so because the worth of the property demanded in return for permission to build is ultimately measured in money, at least from a constitutional standpoint; underlying the Just Compensation Clause is the idea that justice is determined by the amount of money to which an owner is entitled when property is taken. *See* John Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1038 (2003) (money "is the currency with which government pays for property interests under the Takings Clause").

Absent a determination that money is property protected by the Takings Clause, economic difficulties that municipalities around the nation are presently experiencing may tempt these governments to view appropriative demands as shortcuts to paying for needed or desired public benefits. *Dolan*, 512 U.S. at

374 ("A strong public desire to improve the public condition [does not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.") (citation omitted).

A hypothetical highlights the absurdity of different constitutional tests for land exactions and for demands for money or other property interests. A requirement that a property owner provide a public easement on his land in return for development approvals would be subject to the nexus and proportionality requirements of *Nollan* and *Dolan*. Under the rationale of the Florida court, however, a local government's demand for cash would not be, even if it would wildly exceed any impact the proposed use may have. It would be valid as long as the government "could rationally have decided" that the exaction "might achieve" a legitimate objective. *See Nollan*, 483 U.S. at 843 (Brennan, J., dissenting) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)). In this scenario, nothing would prevent the government from exacting the cash, then exercising eminent domain to take the public easement at fair market value, then pocketing the excess while avoiding the nexus and proportionality requirements for the easement. In that case, the unchecked monetary exaction approaches an "out-and-out plan of extortion," not a rational system of land-use planning. *Nollan*, 483 U.S. at 837. Only by confirming a rule that all exactions must have an essential nexus and be roughly proportional to the burdens a proposed use will have can this scenario be avoided.

II. COMPLIANCE WITH THE CONSTITUTION MAKES FOR BETTER PLANNING

The Florida court concluded it was "necessary and logical" to exempt demands for cash or other property from heightened scrutiny because applying the nexus and proportionality standards to those exactions would curtail the ability of local governments to bargain with property owners. *Koontz*, 77 So. 3d at 1231. This rationale fails for at least two reasons.

First, even assuming it were true, curtailment of government's bargaining power by adherence to the Constitution is not a legitimate concern. This Court twice has rejected fears that its takings rules would unduly hinder local land-use planners. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the dissenting Justices argued against the requirement of compensation for temporary takings because it might have chilled the fervor of local governments: "[c]autious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damages action. Much important regulation will never be enacted, even perhaps in the health and safety area." *Id.* at 340-41 (Stevens, J., dissenting) (footnote omitted). Similarly, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), Justice Stevens argued that adoption of a *per se* takings rule "will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental

regulation." *Id.* at 1070 (Stevens, J., dissenting). These concerns were discounted at the time, and have, in retrospect, proven overblown. *See First English*, 482 U.S. at 321 ("We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations."). Fidelity to the Constitution is more important than a local government's freedom to bargain. *First English*, 482 U.S. at 321 (many of the provisions of the Constitution are designed to limit the flexibility and freedom of government authorities").

Second, the nexus and proportionality tests do not prohibit exactions, but merely condition imposition on the government first articulating its justifications. Contrary to the Florida court's conjecture, land-use planning is more likely to benefit from clear rules. As Justice Brennan noted:

> Even if I were to concede a role for policy considerations, I am not so sure that they would militate against requiring payment of just compensation. Indeed, land-use planning commentators have suggested that the threat of financial liability for unconstitutional police power regulations would help to produce a more rational basis of decisionmaking that weighs the costs of restrictions against their benefits. . . . Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal

> rules and operating procedures to minimize overzealous regulatory attempts. . . . After all, a policeman must know the Constitution, then why not a planner? In any event, one may wonder as an empirical matter whether the threat of just compensation will greatly impede the efforts of planners.

San Diego Gas & Elec., 450 U.S. at 661 n.26 (Brennan, J., dissenting) (citations omitted). Justice Brennan's wonderment was confirmed by an empirical study of "the ways in which the new constitutional standards established by *Nollan* and a follow up case, *Dolan v. City of Tigard*, have affected municipal planning behavior" in California, a jurisdiction in which nexus and proportionality are required by *Ehrlich*, 911 P.2d at 433, and the state's Mitigation Fee Act, CAL. GOV'T CODE § 66601(a) (West 2012). *See* Ann E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 105 (2001) (footnote omitted). This study concluded that despite initial "fears about the potentially chilling effects on land use practices . . . [t]he decisions seem to have nudged many localities into more systematic, comprehensive planning through the preparation of reports and studies justifying and documenting the rationale for exacting money or land from developers." *Id.* The study noted it was "surprising and counterintuitive" that planners actually accepted the nexus and proportionality requirements:

> Contrary to initially negative reactions to the Court decisions, we found that an overwhelming percentage of California planners now view the *Nollan* and *Dolan* cases not as an encroachment upon their planning discretion but instead as establishing "good planning practices."

Id. See also id. at 142 ("[A] very large percentage of municipal planners view the Supreme Court takings precedents favorably [and] . . . 74 percent of city planners and 83 percent of county planners either mostly or strongly agree that *Nollan* and *Dolan* amount to good planning practice."). The nexus and proportionality requirements have not held back local governments:

> Many speculated in the post-*Nollan* environment that the takings rulings would restrain the regulatory hand of local governments. Our evidence shows, however, that *Nollan* and *Dolan* have in many cases had a different effect altogether. When municipalities pay greater attention to nexus and rough proportionality, and engage in more systematic, long-range planning they often can justify *higher* fees than they previously charged.

Id. at 122 (emphasis original).

Application of the nexus and proportionality requirements to all exactions may also spur local governments and property owners to contract for development, a much more predictable and stable

planning environment. *Nollan* and *Dolan* appear to have had this effect. *See* Steven P. Frank, *Yes in My Backyard: Developers, Government and Communities Working Together Through Development Agreements and Community Benefit Agreements*, 42 IND. L. REV. 227, 227 (2009) ("[D]irect negotiations between developers and local government are growing in prominence as a means of dispute resolution."); David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After* Nollan *and* Dolan, 51 CASE W. RES. L. REV. 663, 663 (2001) ("Formal agreements between landowners and local government respecting the use of land have increased substantially over the past twenty-five years."); Carlson & Pollack, *Takings on the Ground*, 35 U.C. DAVIS L. REV. at 107 ("the *Nollan* and *Dolan* cases appear to encourage many jurisdictions to shift away from demanding land exactions from developers and toward imposing fees"). There is no reason to believe that application of the nexus and proportionality standards to all exactions would not be similarly viewed and have similar consequences. Indeed, since money is fungible and easier to tailor to any impacts which may be the result of a proposed use of property – both in relationship and in scale – the nexus and proportionality standards should be easier to apply than land exactions. *See id.*

In the absence of rules, local governments may be drawn to regulatory excess because there is little

incentive for restraint, especially when money is tight and officials feel the pressures of a down economy. *See* Carlson & Pollack, *Takings on the Ground*, 35 U.C. DAVIS L. REV. at 120 ("Jurisdictions with significant unfunded infrastructure need and little developable land appear to face the greatest temptation to impose excessive exactions."). Take, for example, the notorious attempts in the 1980s by the City and County of Honolulu to impose a $100 million impact fee on golf course development. *See* DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 45 (1994). *See also* Jose F. Vera, *Sometimes an Impact Fee is Not Just an Impact Fee: The Possible Inequitable Application of Hawaii's Impact Fee Statute to Foreign Investors*, 3 PAC. RIM LAW & POLICY J. 465, 467 (1995) ("In 1990, a Japanese golf course developer agreed to pay an $111 million impact fee for a recently completed golf course and further agreed to pay $200 million in community impact fees for permission to build two more Oahu golf courses."). Under the Florida court's formulation, neither of these would be subject to serious review, even though it is difficult to square such *ad hoc* exactions with the comprehensive land use planning regime which forms the foundation of judicial deference. *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The answer is not that monetary exactions are immune from *Nollan*'s and *Dolan*'s modest requirements that the government articulate a connection between a proposed use and the property surrendered and show the exaction is scaled to the impacts of the use. Unchecked power to impose exactions is deleterious to a system in

which private property forms the basis of a free society.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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